92-1607

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENERAL MOTORS CORPORATION, PETITIONER

v.

JOANN DRENNAN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, imposes on an employer the duty to disclose to its employees the progress of its internal deliberations and union negotiations over whether to modify an existing employee welfare benefit plan or offer a new plan.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Respondents JoAnn Drennan, Rosemary Tate, James E. Lay, William Patterson, Lonnie Turner, Charles Green, Rondell Gilbert, William Kirby, and Daniel Ayres represent a class of former employees at the General Motors Corporation assembly plant at Norwood, Ohio.

The affiliates and subsidiaries of General Motors Corporation, other than wholly-owned subsidiaries, are listed in App. F, *infra*, 40a-51a.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

General Motors Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 5a-21a) is reported at 977 F.2d 246. The opinion of the district court (App., *infra*, 22a-37a) is unreported.

JURISDICTION

The court of appeals entered its judgment (App., *infra*, 1a-2a) on February 5, 1993. A timely petition for rehearing was denied on January 5, 1993. App., *infra*, 3a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28

U.S.C. § 1291, and the district court had jurisdiction under 29 U.S.C. § 1132(e).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, are reprinted at App., *infra*, 38a-42a.

STATEMENT

Respondents are former employees of petitioner General Motors Corporation (GM) who chose to terminate their employment with GM in exchange for a lump-sum payment pursuant to a severance benefit plan. Some time after respondents terminated their employment with GM, a different severance benefit plan was made available, for which respondents, had they still been in GM's employ, would have been eligible. Respondents sued, alleging that, by not telling them at the time they opted for the earlier plan that GM was considering a different severance plan, GM violated its fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). Respondents claimed that their decisions to opt for the earlier plan and resign were the result of those violations and that they therefore were entitled to the greater payments provided for by the latter plan.

A. Business and Fiduciary Capacities Under ERISA

ERISA does not impose requirements on employers to offer or maintain employee welfare benefit plans, nor does it undertake to prescribe the contents of any plans that may be offered. *Nazay* v. *Miller*, 949 F.2d 1323, 1329 (3d Cir. 1991); *cf. Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).[1] ERISA permits an employer to change,

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[1] ERISA distinguishes between "pension plans," see 29 U.S.C. § 1002(2)(A), and "employee welfare benefit plans," see 29 U.S.C.

(continued...)

restrict or withdraw entirely an existing plan, subject only to the original guarantees made in the plan itself and to any collective bargaining agreement with the union representing its employees. *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), cert. denied, 488 U.S. 981 (1988). Decisions to offer, change, restrict or withdraw a benefit plan are referred to as *business* decisions.

Once an employer decides to offer a benefit plan, however, ERISA impresses on the plan administrator the duty to act as a fiduciary in administering the terms of the plan. 29 U.S.C. § 1104(a)(1); 29 U.S.C. § 1002(21)(A). Thus, the plan administrator must act solely with regard to the best interest of the participants, 29 U.S.C. § 1104(a)(1)(A)(i), and must act as a prudent person in carrying out his responsibilities. 29 U.S.C. § 1104(a)(1)(B). See generally *Central States Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570-571 (1985); *Donovan* v. *Bierwirth*, 680 F.2d 263, 271 (2d Cir.) (Friendly, J.), cert. denied, 459 U.S. 1069 (1982). Decisions such as where to invest plan funds, or whether to notify plan participants of a change to the plan's terms, are *fiduciary* decisions regulated by ERISA. *Donovan*, 680 F.2d at 274-275; *Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 n.11 (3d Cir.), cert. denied, 454 U.S. 898 (1981).

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[1] (...continued)
§ 1002(1). The former provide retirement income to employees and are subject to a series of specific statutory requirements. See 29 U.S.C. § 1051. The latter provide a wide array of benefits, including medical, accident, disability, death, unemployment and severance benefits; many of ERISA's regulatory provisions do not apply to welfare plans. See, *e.g.*, 29 U.S.C. § 1051(1). Welfare plans are, however, subject to ERISA's general fiduciary duty requirements. See generally 29 U.S.C. §§ 1104 *et seq*. The plan at issue in this case is a welfare plan, not a pension plan.

Although many employers hire "outside" plan administrators to manage their benefit plans, ERISA expressly allows officers and employees of the employer itself to act as plan administrators. 29 U.S.C. § 1108(c)(3). The courts of appeals have characterized this provision as one that permits an employer to "wear two hats" -- a business hat and a fiduciary hat. See, *e.g.*, *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987); *Amato* v. *Western Union Int'l*, 773 F.2d 1402, 1416-1417 (2d Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986).

B. Factual Background

1. In November 1986, GM announced that it would close its automobile assembly plant in Norwood, Ohio. The closing was scheduled to occur in August 1987. Under the collective bargaining agreement then in force between GM and the United Auto Workers (UAW), three unemployment benefit options were available to employees at the Norwood plant: (1) the Supplemental Unemployment Benefit (SUB) plan; (2) the SUB Buyout option, and (3) the Guaranteed Income Stream plan, which is not material to this petition. Again pursuant to GM's bargaining agreement with the UAW, GM employees at certain plants other than the Norwood facility were eligible for a fourth option, the Voluntary Termination of Employment Program (VTEP). App., *infra,* 6a-7a.

The SUB plan allowed persons on layoff status to remain employees of GM and provided them with a weekly payment to supplement their unemployment benefits. The SUB fund could be depleted, however, if the total demand on it grew to exceed the maximum contribution that could be required from GM under the bargaining agreement. To avoid this risk employees could opt for the SUB Buyout plan, which provided a single lump-sum payment as an alternative to weekly SUB benefits. Selecting this option, however, permanently severed an employee's relationship with GM.

VTEP operated much like the SUB Buyout, but the one-time payment was greater. App., *infra*, 25a-26a.

2. In June 1987, local GM officials at Norwood asked senior management at GM's national office to make VTEP available for all Norwood employees. Those requests were rebuffed. A similar request made the following month was also rejected. In August 1987, local GM officials and local UAW officials again asked their respective national leaderships to extend VTEP to Norwood. Both GM and the UAW rejected the proposal, however, and confirmed that position by signing, in October 1987, a new nationwide collective bargaining agreement under which Norwood employees remained ineligible for VTEP. App., *infra*, 28a-29a.

Local officials of both GM and the UAW tried once more to obtain VTEP for Norwood employees in November 1987. This time GM's national office was willing to take another look at the issue. In January 1988, GM's leadership agreed to a proposal that would bring VTEP to Norwood. Later that month, however, national UAW officials vetoed the proposal, notwithstanding the fact that local union officials had endorsed it. The matter seemed resolved (and VTEP appeared "dead") until GM and UAW officials revisited the question at a meeting called for other purposes in March 1988. In April 1988 -- roughly 10 months after the first request to make VTEP available at Norwood and four months after the national UAW had rejected GM's VTEP proposal -- the company and the union finally agreed to extend VTEP to Norwood employees with 10 or more years of seniority. App., *infra*, 30a-31a.

3. Throughout this entire time period, GM and UAW officials at Norwood faced the task of informing employees of their severance benefit options. GM and the UAW jointly ran an "information hotline" to respond to specific employee questions and wrote and distributed informational flyers. GM and UAW officials also sponsored several meetings with

employees between June and September 1987. App., *infra*, 27a.

As might be expected, one of the questions raised at the meetings concerned the likelihood that VTEP would be extended to Norwood. Having asked this question of their superiors for each of the three prior months, and having three times been rejected, local GM officials responded that VTEP would not be an option for Norwood employees. GM officials also accurately informed employees that, because of layoffs throughout the country, there was a significant possibility that the SUB fund would be depleted and that employees could guard against the risks associated with that possibility by opting for the SUB Buyout. The plaintiffs did so, with the majority leaving GM during September and October 1987 and the last departures coming in February 1988. App., *infra*, 28a-30a.

C. Proceedings Below

1. Plaintiffs filed this action in June 1988, after GM and UAW senior management unexpectedly reversed course and extended VTEP to Norwood. Plaintiffs alleged that GM, through its statements during the last few months of 1987, had misled them into thinking that VTEP would not be extended to Norwood when in fact GM was seriously considering doing so. Plaintiffs claimed that, had they known of GM's plans, they would not have chosen a severance benefit until VTEP was finally adopted in April 1988. App., *infra*, 7a.

The district court ruled for the plaintiffs. After a four-day bench trial, the court found as a fact that "[a]lthough GM *did not make any truly false statements* without the benefit of hindsight, GM did mislead the employees * * * *by not disclosing* that a VTEP-type plan would be offered or even that the local management was pursuing such a plan." App., *infra*, 37a. The court believed that GM's (and the UAW's) decision to make VTEP available only to those persons who

were still employed at Norwood at the time the VTEP program was instituted "simply was not fair." *Id.* at 34a.

The district court discerned a "specific legal underpinning" (App., *infra*, 33a) for its fairness theory in 29 U.S.C. § 1104(a)(1), the fiduciary duty section of ERISA. The court found that the efforts of local GM officials at Norwood to secure VTEP coverage constituted "serious consideration" of VTEP by GM as a whole. Accordingly, it concluded that because "the livelihoods of some 2900 employees were at stake, GM should have at least mentioned the progress and efforts of local management" (*id.* at 37a) and that GM's failure to disclose its internal deliberations violated its fiduciary duty under ERISA. *Id.* at 37a-38a.

2. The court of appeals affirmed. The Sixth Circuit agreed with the district court that "union obstacles notwithstanding, GM was impressed with a fiduciary duty to keep [plaintiffs] abreast of its consideration [of] VTEP * * *." App., *infra*, 15a. The court below explained that this duty can be satisfied if "the employer * * * fairly discloses the progress of its serious considerations to make a plan available to affected employees." *Id.* at 14a.

The court of appeals held that VTEP was under "serious consideration" throughout the entire time period in question here, because "each rejection of the plan stimulated renewed interest and further management explorations" (*id.* at 15a). The court thus concluded that while local GM officials were repeatedly (and at the time fruitlessly) attempting to persuade more senior GM management to offer VTEP, those same local officials were engaged in a course of conduct that detrimentally misled the very employees VTEP was designed to benefit, in violation of ERISA.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision imposes on employers a fiduciary duty to disclose the possible creation of a proposed

welfare benefit plan long before that plan is implemented and in fact long before there is any certainty that it ever will be adopted. Such a duty is unsupported by any provision of ERISA; indeed, it is flatly inconsistent with the statute's express recognition that employers do not surrender their business prerogative to alter benefit plans when they serve as plan administrators. Not surprisingly, the Sixth Circuit's ruling conflicts with the decisions of several other courts of appeals, which have refused to impose such a duty under ERISA.

The duty of disclosure imposed by the Sixth Circuit will have devastating practical consequence for employers, unions, fiduciaries, and employees. Employers who consider proposals to create new welfare benefit plans or modify existing plans will be faced with a Hobson's choice: either disclose their internal deliberations and risk liability if the plan is rejected, or wait until the plan modifications occur and face liability under the rule announced in this case. Review by this Court is plainly warranted.[2]

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[2] Certain language in the court of appeals' opinion may create the misimpression that GM made affirmative misrepresentations to its employees in this case. As noted above, however, the trial judge found that "GM did not make any truly false statements without the benefit of hindsight." App., *infra*, 37a. The court of appeals did not hold that this fact finding was clearly erroneous (see Fed. R. Civ. P. 52(a)); in fact, it is amply supported by the record.

It is undisputed that GM and the UAW did not adopt a VTEP for Norwood employees until April 1988. The district court's findings reflect the fact that, even leaving aside the necessary union approval and focussing solely on GM's internal debates, there was no reason even to believe that a VTEP plan would be approved until mid-December 1987 at the earliest. App., *infra*, 30a. Negotiations with the UAW derailed the proposed plan for several more months. Thus, any statements by GM officials in late 1987

(continued...)

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO CONGRESS' INTENT AS EXPRESSED IN ERISA

When Congress enacted ERISA, it anticipated that the federal courts would develop "a body of Federal substantive law * * * to deal with issues * * * under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Williams), *reprinted in* COMM. ON LABOR AND PUB. WELFARE, 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 94th Cong., 2d Sess. 4771 (1976) ("ERISA LEG. HIST."). Faithful to the congressional directive, this Court has undertaken (and has instructed the lower federal courts to undertake) "to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987). One aspect of this

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[2] (...continued)
to the effect that VTEP would not be available, far from being affirmative misrepresentations, were (at the time they were made) reasonable, good faith predictions based on the best data available. The UAW agrees: "It is obvious that the 'material misrepresentation' was not any affirmative untrue statement, but an apparent failure to disclose the 'progress' of these on-again, off-again negotiations between the UAW and GM on the possibility of a new VTEP plan for Norwood." UAW Brief in Support of General Motors' Motion for Rehearing *En Banc*, at 2.

In any event, the rule announced by the court of appeals does not turn on the presence of affirmative misrepresentations. The Sixth Circuit held broadly that, under ERISA, an employer must "fairly disclose[] the progress of its serious considerations to make a plan available to affected employees" (App., *infra*, 14a) and therefore that "GM was impressed with a fiduciary duty to keep [employees] abreast of its consideration to permit their participation in VTEP" (*id.* at 15a).

"federal common law" concerns the duties and liabilities of fiduciaries under 29 U.S.C. § 1104.

To guide the federal courts in developing a common law of ERISA-fiduciary duties, "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility." *Central States*, 472 U.S. at 570 & n.10, citing S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649, 2 ERISA LEG. HIST. at 2358. As in any other common law inquiry, however, Congress assumed that courts facing new questions would also consider sound policy and would ensure that any rules that were created would not frustrate the legislative scheme as expressed in other portions of ERISA. Thus, when defining duties under ERISA, courts were expected to rely on but not be limited by the common law of trusts and to consider the statute as a whole and the policies underlying the statute. See generally *Central States*, 472 U.S. at 570-571.

None of the three factors set forth above supports the Sixth Circuit's rule of disclosure. First, under the common law of trusts, no duty exists to disclose inchoate and speculative information of the sort at issue here. Second, there is good reason why the common law does not impose such a requirement: the policy underlying the fiduciary duty of disclosure -- to ensure that beneficiaries make informed and rational decisions -- would be retarded, not advanced, by requiring the disclosure of speculative information. Finally, the Sixth Circuit's rule is at odds with other provisions of ERISA, because it would heavily penalize employers for exercising an option Congress explicitly made available to them.

A. The Sixth Circuit's decision to impose on ERISA fiduciaries a duty to disclose plan changes "under consideration" is plainly wrong. The statute imposes no duty on plan

administrators to disclose *proposed* plan modifications. As the Seventh Circuit has explained, until terms and conditions have been incorporated into a plan, administrators under ERISA have no fiduciary duty relating to those provisions. "United could not have breached any fiduciary duties with respect to the terms of the plan *until those terms were incorporated into the plan* * * *." *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985).

ERISA in this regard reflects the common law of trusts, which also imposes no general duty of disclosure (as opposed to specific duties regarding statements of account, see, *e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 172 (1959)) on trustees. The sole exception to this general rule is a specific "duty to communicate to the beneficiary material *facts* affecting the interest of the beneficiary" of which the beneficiary is unaware "and which the beneficiary needs to know for his protection in dealing with a third person * * *." *Id.* § 173 comment d. Thus, in *Branch* v. *White*, 239 A.2d 665, 670-671 (N.J. Super. Ct. App. Div.), cert. denied, 242 A.2d 13 (N.J. 1968), the court found that trustees were liable for failing to inform beneficiaries of the fact that a contribution of two dollars per month was required to participate in a pension plan.

This case, by contrast, involves no such clear, fixed, and ascertainable "fact." Plaintiffs have not claimed that GM falsely informed them that they were ineligible for VTEP in the fall of 1987, or that GM falsely denied the existence of VTEP once it was formally implemented at Norwood, or that GM in any other way failed to bring to their attention a material fact concerning an *existing* welfare benefit plan. Rather, their sole complaint (and the Sixth Circuit's sole ground for imposing liability) was that GM failed to disclose the *possibility* that, at some point down the road, VTEP *might*

become available at Norwood.[3] Such an inherently speculative possibility hardly qualifies as the sort of "fact" the common law of trusts contemplates as falling within the narrow exception to the general rule of non-disclosure. See, *e.g.*, *Shipley* v. *Crouse*, 370 A.2d 97, 104 (Md. 1977) (when the information in question concerns "delicate" "negotiations," "the beneficiaries are [not] entitled to anything more than a disclosure of the end product"); *Miller* v. *First Hawaiian Bank*, 604 P.2d 39, 42 (Haw. 1980) (trustee had no duty to disclose investment opportunity that did not in itself "affect the beneficiary's interest in the trust property"); *McNair* v. *Capital Elec. Power Ass'n*, 324 So. 2d 234, 240-241 (Miss. 1975) (trustee did not violate fiduciary duty by failing to disclose, prior to the sale of assets requiring approval of beneficiaries, the possibility that the assets might be significantly undervalued, because the reported value of the assets had a basis in fact, and because the question of valuation was a complicated one that depended on many factors).

B. The Sixth Circuit's rule of disclosure is as ill-advised as it is unsupported by the provisions of ERISA and the common law. As this Court has noted in an analogous context, "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm

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[3] Although the Sixth Circuit asserted that its disclosure rule "does not require the employer to predict an ultimate decision to offer a plan" (App., *infra*, 14a), the facts of this case belie that assertion. Because senior GM officials consistently *rejected* requests to extend VTEP to Norwood, any statement on the part of local GM officials to the effect that VTEP might one day be offered would have required them to "predict" that their superiors would reverse course on a matter that had been thoroughly and repeatedly considered. Moreover, local GM officials would have had to "predict" that the UAW's national leadership also would change its mind and approve any VTEP extension that GM was willing to make.

than good." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976).

The rule adopted by the Sixth Circuit purports to require disclosure only when the decision whether to adopt a new plan or modify an existing one is under "serious consideration." App., *infra*, 14a (internal quotations omitted). In reality, however, the rule will require fiduciaries to disclose, as "material" information, the mere possibility that a plan might be changed. As the facts of this case show, precisely what constitutes "serious consideration" is not susceptible to a fixed definition and is likely to vary from case to case depending on (among other things) a court's sense of what is "fair" (*id.* at 33a). An employer that briefly contemplates a plan change therefore cannot predict whether a court will later decide that the employer was "seriously considering" the change. Because significant liability attaches when a court makes such a determination, employers will be forced to err overwhelmingly on the side of caution and to disclose any suggestion that an employee welfare plan be modified.

Many, indeed most, such proposals never come to fruition. Even proposals that are eventually adopted are frequently rejected first (by either the employer or the union), only to be revived later in substantially modified form. In this case, VTEP itself was rejected repeatedly and, though as originally proposed would have covered all Norwood employees, was modified to cover only those employees with 10 or more years of seniority before final agreement was secured from all necessary parties. Yet under the Sixth Circuit's decision, any fiduciary with knowledge of such a "non-plan" will be forced to disclose it.

Disclosure of such speculative information creates great risk that it may be overvalued, and therefore relied on to an employee's detriment. Employees faced with making important decisions in the traumatic context of a plant closing may hold out for a better plan that never materializes or that,

when finally implemented, turns out to be far less beneficial than originally believed. If, in the interim, previously available options have deteriorated or have been foreclosed completely, those employees will have been harmed by the employer's disclosure of the proposed plan -- a disclosure compelled by the decision below. And an employee thus harmed, emboldened by the court of appeals' ruling here, no doubt will sue, claiming either (1) that the proposed plan initially disclosed was too inchoate and its disclosure therefore was misleading, or (2) that the employer should have more promptly notified the employees when the proposal's chances began to look bleak. The decision thus promises to visit upon employers throughout the nation a flood of litigation similar to that attending the securities industry, where every predictive statement that proves untrue (or, proving true, causes a would-be plaintiff to think that it should have been made sooner), becomes the basis for a lawsuit alleging failure to disclose a "material" fact.[4] That surely was not Congress' intent in passing ERISA.

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[4] The Securities and Exchange Commission has attempted to reduce this flood by promulgating Rule 175 (17 C.F.R. § 230.175), which provides a "safe harbor" for what would otherwise constitute material, misleading statements by an issuer of securities. If such a statement is "forward looking" and concerns certain topics recognized by the SEC as necessarily subject to change, it cannot be the basis of liability if it was made in good faith and with a "reasonable basis." See generally *Wielgos* v. *Commonwealth Edison Co.*, 892 F.2d 509, 512-514 (7th Cir. 1989).

Rule 175 reflects the SEC's understanding that "soft" information -- like the possibility that a new welfare plan *might* be offered -- is inherently subject to change, and therefore not a suitable basis for the imposition of liability. Because no such "safe harbor" exists for employers under ERISA, the imposition of a duty to disclose "soft" information carries an even greater potential for litigation and liability.

C. The decision also trenches impermissibly on the business rights of employers. This Court has observed that "ERISA does not mandate that employers provide any particular benefits" to employees. *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 91 (1983). An employer's decision to extend or not to extend welfare benefits is made in light of market forces: the cost of extending the benefits, the effect on the morale and quality of the workforce if the benefits are denied, the practices of employers competing for the same workers, and so forth. As a business decision, it is left to the business judgment of those who manage the corporation.

In enacting ERISA, Congress did not purport to change that state of affairs, and instead recognized the "voluntary nature of private retirement plans." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639, 2 ERISA LEG. HIST. at 2348; see also *Alessi*, 451 U.S. at 511. Congress also declined to subject welfare benefit plans to the same stringent requirements applied to pension plans, because it was well aware that it would have severe, negative repercussions on the entire employee benefit system if employers were denied the flexibility to amend such plans. See H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726, 2 ERISA LEG. HIST. at 3180. And Congress made clear that these business judgments were not to be compromised simply because officers of the employer, already charged with managing the company itself, "wore two hats" by also serving as plan administrators. 29 U.S.C. § 1108(c)(3). Faithful to this congressional intent, the Department of Labor, which is responsible for administering the fiduciary duty provisions of ERISA, "has consistently taken the position" that business decisions are "not subject to ERISA's fiduciary duty requirements." Letter from Dennis M. Kass, Ass't Sec. of Labor, to John N. Erlenborn, Chairman, Advisory Council on Employee Welfare and Pension Benefit Plans (Mar. 13,

1986), *reprinted in* 13 PENS. REP. (BNA) No. 11, at 472 (Mar. 17, 1986).

Numerous court of appeals' decisions reflect these principles. See, *e.g.*, *Fletcher* v. *Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991); *Belade* v. *ITT Corp.*, 909 F.2d 736, 738 (2d Cir. 1990); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-1160 (3d Cir. 1990); *Sutton* v. *Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984). Indeed, every circuit to consider the question has understood that the mere fact that an employer performs certain fiduciary functions as a plan administrator does not constrain that employer, in its business functions, to maximize its employees' interests at the expense of its own. As the Eleventh Circuit has stated, "ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets." *Phillips*, 799 F.2d at 1471; see also *Trenton* v. *Scott Paper Co.*, 832 F.2d 806, 808-809 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1988). See generally Stanley, *The Definition of a Fiduciary Under ERISA: Basic Principles*, 27 REAL PROP., PROBATE & TR. J. 237, 244-245 (1992).

The duty of disclosure created in this case violates these core ERISA principles when applied to "two hat" employers. It impermissibly imposes fiduciary duties on such employers *as employers* by requiring them to disclose information that otherwise would be kept fully confidential until a business decision had been reached. It is undisputed that an employer *qua* employer has no duty to disclose that a new benefit plan, or changes in an existing benefit plan, are under consideration. If that employer's existing benefit plan were administered by an "outside" fiduciary, that fiduciary would not even know of a proposed new plan, or of proposed modifications to an existing plan, until such changes were agreed to, finalized and ready to be implemented. Thus, even under the unique disclosure rule of the Sixth Circuit, proposed

changes to a plan administered by an "outside" fiduciary would -- in practice -- remain confidential for the simple reason that the fiduciary would not be aware of them, and therefore would have no information to disclose.

"Two hat" employers, by contrast, will always have knowledge of possible benefit plan changes. Despite the fact that such knowledge derives from their role as employers, rather than as plan administrators, and despite the fact that an employer has no fiduciary duty to divulge proposed benefit plan changes to its employees, "two hat" employers inevitably will be required to make such disclosures under the Sixth Circuit's rule because they also serve as plan administrators. Accordingly, by irrationally and arbitrarily distinguishing between employers that retain an outside fiduciary and those that administer the benefit plan themselves, the Sixth Circuit's rule creates a powerful incentive for employers to shift away from self-administered benefit plans and threatens to destroy the very "two hat" arrangement that Congress expressly provided for in the ERISA scheme. See 29 U.S.C. § 1108(c)(3).

II. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Sixth Circuit's decision in this case conflicts with the decision of every other court of appeals to consider the question whether ERISA imposes a duty of disclosure on an employer that is considering making changes to its benefit plan.

In *Stanton* v. *Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), for example, the plaintiff had retired and elected to receive benefits under an existing plan. Shortly before the plaintiff retired, Gulf considered and approved a new employee welfare plan providing for greater severance benefits. The new plan was instituted on the date of the plaintiff's retirement. Prior to selecting the plan he did, Stanton specifically

asked representatives of Gulf whether a more attractive plan was in the works. Gulf representatives did not inform him that the new (and more attractive) plan had been approved. The plaintiff sued, claiming that he was entitled to the benefits of the new plan because Gulf had violated its fiduciary duty under ERISA by not disclosing its consideration of that plan.

The Fourth Circuit rejected Stanton's claim. The court of appeals noted that the statements made to Stanton by Gulf officials did not constitute "misrepresentations," because all that Stanton had asked for was information "about the possibility of changes which could be made" at some future point. 792 F.2d at 435. The Fourth Circuit held that Gulf was under no duty to disclose such a possibility, stating that "[i]t is not a violation of ERISA to fail to furnish information regarding amendments before these amendments are put into effect." *Ibid.*

Similarly, in *Payonk* v. *HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989), the Third Circuit was presented with a breach of fiduciary duty claim brought by a class of plaintiffs "who withdrew from a defined benefit pension plan shortly before its termination and, therefore, did not share in the distribution of the surplus of the Plan." *Id.* at 222. The plaintiffs alleged that, had they known that the plan was about to be terminated and that all plan participants were entitled to share in any surplus existing upon termination, they would not have withdrawn from the plan when they did. *Id.* at 224. They also relied on the fact that the employer repeatedly had urged them to withdraw from the plan shortly before it was terminated. *Id.* at 223. Because the company acted in a fiduciary capacity in administering the plan, plaintiffs argued, the employer "had an affirmative duty to disclose termination information which it possessed." *Id.* at 225.

The Third Circuit rejected the employees' theory and upheld a grant of summary judgment for the employer. An-

nouncing the judgment of the court, Judge Garth began by noting that the determination whether to terminate the pension plan was a business decision "that could only have been made and effectuated by HMW in its role as employer." 883 F.2d at 227. Judge Garth then held that disclosure (in advance of whatever disclosure was required by the terms of ERISA itself) was not mandated by any fiduciary duty. *Ibid.* Judge Garth pointed out that "the fallacy in Payonk's argument lies in his failure to distinguish between" HMW's role "as an employer * * * and [its] role * * * as a fiduciary of the plan * * *." *Id.* at 229. In language so instructive to this case as to warrant full quotation, Judge Garth explained:

> [T]he fiduciary roles of the employer and plan administrator differ, as they are separate entities. Indeed, HMW, as plan administrator, would not normally be aware of the decision making process until after a decision on termination (or on any other plan change brought about by reason of a business decision) had been made by HMW as employer. * * * Since the statute expressly sanctions an employer wearing "two hats," *see* ERISA, § 408(c)(3), 29 U.S.C. § 1108 (c)(3), we can perceive no reason why HMW's decision to terminate its plan should put Payonk in a better position than Payonk would otherwise have been in had someone other than HMW been the plan administrator.

Ibid.

Judge Stapleton concurred separately, stressing that HMW's knowledge of the proposed plan termination was "possessed free of a fiduciary duty to the plan and its participants" because it was the result of "information generated internally in the course of making" a business decision. 883 F.2d at 231. Judge Stapleton remarked that "Congress, having given sponsors the choice of serving in a dual capacity," did not intend "to penalize [two hat employers] by requiring greater disclosure of business decisions from

them than from corporations acting solely as plan sponsors." *Id.* at 232.

The Sixth Circuit's opinion in this case cannot be reconciled with the Third Circuit's decision in *Payonk*, the Fourth Circuit's decision in *Stanton*, or the decisions of numerous other courts that have rejected similar claims under ERISA. As Judge Stapleton pointedly observed in *Payonk*: "In the context of plan amendments, *the courts have been unanimous in adopting [GM's] view: Changes in plans need not be disclosed until they become effective.*" 883 F.2d at 232 (emphasis added). See *Barnes* v. *Lacy*, 927 F.2d 539, 543-544 (11th Cir. 1991) (rejecting the view that an employer has "a duty to announce its intention to reserve the right" to make changes to existing plans or to offer new ones), cert. denied, 112 S. Ct. 372 (1991); cf. *Porto* v. *Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (per curiam) (rejecting the view that ERISA's fiduciary duties include an affirmative duty to disclose plan changes prior to the notification mandated by ERISA's disclosure provisions), cert. denied, 485 U.S. 937 (1988); *Young*, 849 F.2d at 1045 (same).[5]

The decision below thus stands alone in imposing such a duty of disclosure on employers and in "penaliz[ing]" (*Payonk*, 883 F.2d at 232) employers for wearing "two hats." This Court should grant review to resolve this conflict.[6]

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[5] See also *Trexel* v. *E.I du Pont de Nemours & Co.*, 845 F.2d 1016 (3d Cir. 1988), aff'g mem. No. 85-759 (D. Del. Sept. 4, 1987); *Fischer* v. *Philadelphia Elec. Co.*, No. 91-2771, 1992 U.S. Dist. LEXIS 11395 (E.D. Pa. July 27, 1992); *Sleichter* v. *Monsanto Co.*, 612 F. Supp. 856 (E.D. Mo. 1985).

[6] Some of the decisions discussed above hold not only that an employer has no duty to disclose a proposed new benefit plan but also that an employee has no standing to sue for such a failure to disclose. These decisions rest on the theory that, because the

(continued...)

III. THE COURT OF APPEALS' DECISION WILL HAVE GRAVE PRACTICAL CONSEQUENCES FOR BOTH EMPLOYERS AND EMPLOYEES

The Sixth Circuit's erroneous decision will have far-reaching and severely undesirable effects on employers, employees, and labor-management relations.

A. As this Court is aware, many companies, including GM, have been faced in recent years with the need to reorganize their operations to remain competitive. These reorganizations frequently involve reductions in the workforce, which in turn necessarily require consideration of potential benefit plan amendments to facilitate staffing objectives. In the case of GM alone, this often requires the

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[5] (...continued)
plaintiff employee was, by definition, neither a "participant" in nor a "beneficiary" of the non-existent plan, he has no standing to sue regarding that plan under ERISA. See *Stanton*, 792 F.2d at 434, citing 29 U.S.C. § 1132(a)(2). The Sixth Circuit's decision is in tension with this rationale, as evidenced by a recent Tenth Circuit decision (*Raymond* v. *Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir. 1993)) holding that plaintiffs whose employment had terminated prior to their becoming eligible for a welfare benefit lacked standing to sue for that benefit. The Tenth Circuit attempted to distinguish the decision in this case by stating (*id.* at 1535 n.11):

> In *Drennan*, the Sixth Circuit held that employees who were eligible for a certain benefit payout were participants for ERISA purposes, even though they had already received their benefits under another, less favorable, benefits plan. By contrast, plaintiffs here in fact received all benefits for which they were eligible. They cannot claim participant status based on eligibility for benefits not received.

We submit that this distinction is strained. Plaintiffs here also received "all benefits for which they were eligible" (*ibid.*) before their separation from GM.

negotiation of changes to benefit plans with unions representing more than 300,000 employees. Because these negotiations occur simultaneously with GM's administration of existing benefit plans, the Sixth Circuit's newly-created duty of disclosure imposes an impossible obligation on plan administrators.

The far-reaching effect of the court of appeals' decision is not speculative. Two class actions have already been filed since the district court's ruling, claiming that GM breached its fiduciary duties under ERISA by failing to inform employees of potential benefit plan amendments being negotiated with the UAW. See *Swinney* v. *General Motors Corp.*, No. C-1-92-302 (S.D. Ohio filed April 3, 1992); *Sherrod* v. *General Motors Corp.*, No. 1:92CV 2036 (N.D. Ohio filed Sept. 30, 1992). Because the Sixth Circuit has now confirmed that plan participants may sue whenever an amendment eventually adopted was not disclosed while it was in the planning stages, such suits will surely multiply. One recent commentator has noted the grave implications of the decision below, remarking that it "represents a departure from the usual rule." *General Motors Liable for Fiduciary Breach Where Automaker Failed to Reveal Planned Benefit Changes to Laid-Off Workers*, 20 TAX MGMT. COMP. PLAN. J. 260 (1992).

Indeed, the Sixth Circuit's unique and ill-advised rule may well become the *sole* governing rule for any company with nationwide operations. Companies such as GM administer benefit plans that cover employees at plants in, for example, Maryland, New Jersey, and Ohio. They cannot, as a practical matter, provide one set of information to their employees at the first two plants (which fall within the Fourth and Third Circuits) and an entirely different set of information to employees at the third (which falls within the Sixth Circuit). Because they also cannot afford to face the liability that would attach in the Sixth Circuit for violating the "affirmative disclosure" regime mandated by this case,

nationwide employers will be forced to follow the aberrant rule of this case rather than the rules announced in other circuits.

B. The Sixth Circuit's requirement of disclosure will damage the interests of employees as well. By subjecting employees to a barrage of premature and incomplete information, it virtually ensures that any truly important communications will be drowned out in the general cacophony.

Once information about a proposed plan change has been released, indications that the plan will *not* be amended are at least as material to employees as was the initial information that the amendment was proposed. The court of appeals' disclosure standard therefore necessarily requires employers to provide regular updates on the "on-again, off-again" progress of any proposed changes. Since liability will attach for failing to disclose any material fact about the not-yet-existent plan, a fiduciary will have no choice but to issue such updates to lessen the likelihood that the initial disclosure will itself become misleading if the plan ultimately is rejected.

This case provides a good example. On the facts found by the district court, at least 15 separate notifications would have been necessary between June 1987 and April 1988 even minimally to apprise Norwood employees of the individual proposals and rejections of VTEP, both within GM and in negotiations between GM and the UAW. It is unclear what conclusions employees would draw from a constant stream of messages sending conflicting and confusing signals, but we respectfully submit that it will not serve the interests of employees seeking to make an intelligent judgment about plan benefits. As this Court has observed, it "is hardly conducive to informed decisionmaking" to be buried "in an avalanche of trivial information." *TSC Industries*, 426 U.S. at 448-449.[7]

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[7] The danger that the flood of information will overwhelm its (continued...)

C. Whether to provide a VTEP plan for the Norwood employees was not, and could not have been, determined by GM alone. The decision was and could only have been made through the process of collective bargaining with the UAW. Accordingly, representatives of UAW Local 674 participated in the meetings with employees at which the various options were discussed and joined with GM managers at the plant and division level in proposing that GM and the UAW approve a VTEP for Norwood. The International Union repeatedly rejected the VTEP proposal, however, because it would have "carved out" the benefits already paid under the SUB plan and would not have been available to employees who had already accepted the SUB Buyout plan. The parties revived the possibility of a VTEP at a joint GM-UAW meeting in March 1988, and by the following month the company and the union had agreed upon a VTEP that would not carve out previous SUB payments but that would exclude those workers who had already elected the SUB Buyout. App., *infra*, 31a-32a.

The court of appeals' decision requiring GM to disclose to employees that it was "seriously considering" a VTEP for Norwood would greatly handicap the bargaining process. As the Seventh Circuit has explained, "[t]he duties imposed on a fiduciary are inconsistent with the demands of negotiation and collective bargaining." *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir.

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[7] (...continued)
intended beneficiaries is even greater here than in the contexts regulated by the securities laws. Most information disclosed in the securities realm is reviewed by institutions and professional analysts, which possess the resources to separate the probative from the merely speculative or trivial. Individual ERISA plan participants, by contrast, are far more likely to be harmed by an overload of information. See generally Brudney, *A Note on Materiality and Soft Information*, 75 VA. L. REV. 723, 733 n.30 (1989).

1985). An employer considering such a proposal, but wanting to strike the best deal with the union, might very well feign an initial lack of interest, or propose terms substantially less generous than those it expects to settle for in the end. Similarly -- as in this case -- the union might flatly reject a proposal at the beginning of the negotiation process in the hope of getting a better one later on. Bargaining strategy aside, if a company were to disclose tentative proposals directly to employees, it would likely be viewed as an effort to circumvent the union, thereby creating an antagonistic atmosphere between the company and the union. See, *e.g.*, *NLRB* v. *General Electric Co.*, 418 F.2d 736 (2d Cir. 1969). To require *either* party to disclose what it is considering in order not to "mislead" employees would make normal bargaining impossible. Yet that impossibility is precisely what the Sixth Circuit's rule of disclosure requires.

The Sixth Circuit's rule is also virtually impossible to administer in the context of a large employer, with hundreds of thousands of employees represented by a nationwide union. The collective bargaining agreement between GM and the UAW provides for approximately a dozen employee welfare plans. Particularly when the company is in the process of reorganizing, GM is frequently "seriously considering" changes to one plan or another. Under the decision below, GM and the UAW would be obliged to provide information to employees on an almost weekly basis, detailing the ups and downs of their negotiations.

The force of these considerations caused the UAW to file *amicus curiae* briefs in support of GM in the proceedings below. The union was concerned that the Sixth Circuit had imposed an unworkable regime, one that would disserve the interests of employees generally, and one that would frustrate the process of collective bargaining. See UAW Br., *supra*, at 3-5. That the UAW -- the elected and certified representative of the employees who participate in welfare benefit plans -- believes that GM fulfilled its obligations under

ERISA and that the Sixth Circuit's rule is highly undesirable surely provides confirmation that the decision below is inconsistent with the congressional design.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos: 90-3659; 90-3660

JOANN ; ROSEMARY TATE; JAMES E. LAY; WILLIAM PATTERSON; LONNIE TURNER; CHARLES GREEN; RONDELL GILBERT; WILLIAM KIRBY; DANIEL AYRES, on their own behalf and on behalf of those similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellant/Cross-Appellee.

Before: **Keith** and **Martin**, Circuit Judges, and
Krupansky, Senior Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the district court's determination of General Motors Corporation's liability for breaching its ERISA fiduciary duty to the Class is affirmed. IT IS FURTHER ORDERED that the award of damages and the award of attorney's fees are reversed and remanded for findings of fact and a statement of reasons.

ENTERED BY ORDER OF THE COURT

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Leonard Green, Clerk

Issued as Mandate: February 5, 1993 A True Copy.

COSTS. None Attest:

Filing Fee..... $
Printing..... $

Total..... $

_____

Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-3659/3660

JOANN DRENNEN, ET AL.,	)	
	)	
Plaintiff-Appellees/Cross-Appellants,	)	
	)	
v.	)	ORDER
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant-Appellant/Cross-Appellee,	)	
	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,	)	
	)	
Amicus Curiae. (90-3659)	)	

BEFORE: **KEITH** and **MARTIN**, Circuit Judges; and **KRUPANSKY**, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Filed: January 5, 1993

APPENDIX C

Nos. 90-3659, 90-3660.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JoAnn Drennan; Rosemary Tate; James E. Lay; William Patterson; Lonnie Turner; Charles Green; Rondell Gilbert; William Kirby; and Daniel Ayres, on their own behalf and on behalf of those similarly situated,

Plaintiffs-Appellees, Cross-Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellant, Cross-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed October 13, 1992

Before: KEITH and MARTIN, Circuit Judges, and KRUPANSKY, Senior Circuit Judge.

KRUPANSKY, Senior Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. MARTIN, Circuit Judge (pp. 15-16), delivered a separate opinion concurring in part and dissenting in part.

KRUPANSKY, Senior Circuit Judge. The defendant-appellant, General Motors (GM), has appealed from the decision of the district court, issued following a bench trial, that found GM had breached its fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1001 *et seq.*, by misleading its laidoff employees by announcing that the Voluntary Termination of Employment Program (VTEP) benefit plan would not be available for their participation.

The plaintiff-appellees are 270 former employees of the Norwood, Ohio GM assembly plant with ten or more years of seniority (Class). GM closed the Norwood plant in August, 1987, and placed the Class Members on layoff status. On or about September 15, 1987, GM notified all laidoff employees of their right to participate in a benefit plan styled Supplemental Unemployment Plan Separation (SUB Buyout). The SUB Buyout provided an employee with a lump sum payment in consideration for the employee's agreement to voluntarily forfeit his/her seniority status, employment status, and layoff status with GM. The Class ultimately accepted the SUB Buyout.

GM also had in effect during this period another benefit plan entitled Voluntary Separation of Employment Program (VTEP). Like the SUB Plan, VTEP was available to only those employees who agreed to terminate their employment with GM, forfeit seniority status, and relinquish all vested retirement benefits and post-retirement health care benefits. VTEP provided a substantially larger lump sum final payment

than the SUB Buyout as consideration for an employee's participation. Under the existing bargaining agreement creating VTEP, GM was not required to offer participation in VTEP to laidoff Norwood employees, i.e., the Class.

After GM announced the layoff, but before the Class accepted the SUB Buyout, the Class members questioned plant management about their right to participate in VTEP. Although the Norwood plant management consistently denied that VTEP would become available to them, GM management was, in fact, privately considering the option of their participation in VTEP. Relying upon management's statements, the Class accepted the SUB Buyout. Shortly after they accepted the SUB Buyout, management announced the availability of the VTEP option to all GM employees with ten or more years of seniority. The Class, accordingly, was no longer eligible since its members had accepted the SUB Buyout and terminated employment with GM.

The Class initiated this action on June 7, 1988, and amended its complaint on July 20, 1988. It alleged that GM had misled its members into believing VTEP would never be available to them and had breached its fiduciary duties under ERISA, 29 U.S.C. section 1104. The district court certified the class on October 27, 1988, defining the class as "former GM Norwood Plant employees who had more than ten years of GM employment prior to being placed on layoff status in August, 1987, and who terminated their relationship with GM subsequent to their layoff by accepting the Supplemental Unemployment Benefit Buyout Plan." The Class Members filed a second amended complaint on December 2, 1988.

After a four-day bench trial, the district issued its findings of fact and conclusions of law on February 22, 1990. It found GM liable for violating ERISA. The district court concluded that the Class were entitled to recover VTEP benefits, less the amount already paid to its members from the SUB Buyout. The court later awarded damages of $3.6

million, plus attorney's fees of $600,000.00 and expenses of $22,383.62, and set aside the contingent fee contracts between the plaintiffs and their attorneys. Final judgment was entered on June 21, 1990.

GM has timely appealed from both the liability decision and the award of attorney's fees. The Class cross-appealed the reduction of payable VTEP benefits by unemployment benefits and GM's funded weekly Supplemental Unemployment Benefit Plan (SUB Plan) payments already paid to its members. The Class also cross-appealed the court's order setting aside the attorney contingent fee contracts and the amount of the awarded attorney's fees.

The underlying facts of this action are comparatively simple. GM experienced a decline in sales during the middle and late 1980s and decided to close some of its older and less efficient assembly plants, such as the Norwood facility. It made this information public in November, 1986, and closed the plant in August, 1987. Approximately 3700 employees were affected, of which approximately 2900 had at least ten years seniority with GM. GM informed the employees that the Norwood plant would not reopen and that GM was eliminating assembly plants and reducing the workforce companywide.

The United Auto Workers (UAW) was the collective bargaining agent for all of the Class. The local bargaining agent was Local 674. During the period here in controversy, company/employee relations were governed by a company-wide collective bargaining agreement that became effective October 26, 1987, which incorporated the October 22, 1984 SUB Plan. The SUB Plan provided laidoff employees with a limited number of weekly payments in addition to the unemployment benefits paid by the State of Ohio. If an employee elected to maintain employee status under this plan, the employee accepted the risk that the SUB benefits fund would become depleted or that the employee would become

ineligible for collateral benefits provided after the expiration of state unemployment benefits.

GM's consideration of the Class's participation in VTEP was initiated during November, 1986, when the plant closing was announced. Thereafter, during the ensuing months to April 12, 1988, when GM made a VTEP program available to GM employees with more than ten years of seniority upon application, GM management had, in fact, been seriously considering this ultimate action without disclosing the internal progress of those considerations to the Class. To the contrary, throughout this entire period GM was instructing its management personnel to convey negative impressions to the Class indicating that VTEP would not be available for their participation and that the program was "dead in the water" as far as Norwood laid-off employees were concerned.

As a result of GM's misrepresentations during the period between September 1987 and February 1988, the Class elected to accept the SUB Buyout. When GM ultimately declared all employees with ten or more years seniority eligible to apply and participate in VTEP, it excluded the Class because GM asserted that its members were no longer considered to be GM employees, having relinquished and forfeited all of their employee rights as a result of accepting the SUB Buyout.

Following the four-day bench trial, the district court found that VTEP was an employee welfare benefit program, which created certain fiduciary responsibilities between GM and its concerned employees under ERISA pursuant to 29 U.S.C. section 1104. The district court found that GM had been seriously considering offering VTEP, which was superior to the SUB Buyout, to the Class before its members accepted the latter plan as a result of GM's misrepresentations. Accordingly, the district court concluded that GM had violated its fiduciary duty not to make either intentional or negligent misrepresentations concerning the availability of

participation in the preferable VTEP plan. The court also found that GM had "misled the employees of the Norwood plant by not disclosing that a VTEP-type plan would be offered or even that the local management was pursuing such a plan."

The court thereupon decided that the Class Members were entitled to participate in VTEP, minus the SUB Buyout they had received. The court also determined that the conduct of GM did not warrant the assessment of prejudgment interest. On June 21, 1990, the court awarded damages, fees, and costs, relying upon GM's calculations in awarding the Class $3,651,186.21 as damages. In addition, because GM did not object to the amount, the court awarded expenses of $22,383.62.

The district court accepted the calculation of hours and rates presented in the plaintiffs' application for attorney's fees, but disallowed projected future fees. The precise figure of $299,188.00 was rounded to $300,000.00 (the lodestar) and awarded to the plaintiffs' attorneys. Also based upon the reasoning in the fee application, the court awarded a multiplier of two, thus enhancing the total amount of attorney's fee payable to $600,000.00. The court noted that, aside from the anticipated future fees, GM did not object to the number or rate of the hours filed. The court declared the awarded attorney's fees to constitute full compensation and set aside any contractual obligation of any member of the class to pay attorney's fees. Thus, all sums advanced to the attorneys were to be returned to the Class members.

Initially, GM argued that the Class had no standing to participate in the VTEP during the period here in controversy. Consequently, GM had no fiduciary responsibilities to its members.

ERISA defines a "participant" in an employee benefit plan to mean "any employee or former employee of an employer ... who is or may become eligible to receive a

benefit of any type from an employee benefit plan which covers employees or members of such organization." 29 U.S.C. § 1002(7). VTEP was a buy-out, by GM, of the Class members' vested benefits, including their pension plans. The Class members were eligible for such a plan at the time the asserted breach of fiduciary duty occurred and had no future eligibility requirements to fulfill. Contrary to GM's contentions that the pronouncements of *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115-19, 109 S.Ct. 948, 957-58, 103 L.Ed.2d 80 (1989), limited ERISA standing to employees with vested employee benefits, the *Firestone* Court addressed only the disclosure requirements of ERISA, 29 U.S.C. 1024(b)(4), as they applied to former employee participants and explicitly expressed no view "as to whether the [former employees] were 'participants' with respect to the benefit plans to which they sought information." *Firestone*, 489 U.S. at 118, 109 S.Ct. at 958. Since the Class was eligible to participate in the employee benefit plan, its members had standing to bring this suit under ERISA.

GM has also appealed the district court's conclusion that GM was under an ERISA fiduciary duty to disclose its considerations to permit Class participation in VTEP during the joint employee management meetings in September, 1987 and that its failure to do so coupled with management's negative statements concerning the Class's participation in VTEP violated its ERISA-imposed fiduciary duties.

The intent of Congress in enacting ERISA was to protect the "interests of participants in employee benefit plans ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). Section 1102 provides for two types of fiduciaries: the named fiduciaries in the written instrument creating the plan, who control and manage the administration of the plan, 29 U.S.C. § 1102(a)(1); and the "discretionary" fiduciaries, who have some discretionary authority over the administration of the plan, 29 U.S.C. § 1002(21)(A).

ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). The fiduciary must exercise its duties

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. § 1104(a)(1)(B).

Company management often wears two hats in the administration of company benefit plans. Existing precedent has recognized the distinction between an employer's prerogative to initiate discretionary policy decisions such as creating, amending, or terminating a particular plan as compared to its fiduciary responsibilities to administer an existing plan for the benefit and interests of its participant-employees. *Sutter v. BASF Corp.*, 964 F.2d 556, 561-62 (6th Cir. 1992); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947-49 (6th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990); *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989).

Misleading communications to plan participants "regarding plan administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty." *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir.1988) (citations omitted). Although noting that previous cases involved misrepresentations regarding an existing ERISA plan, the *Berlin* court concluded that material misrepresentations concerning a prospective or contingent ERISA plan would give rise to liability if the plan was under "serious consider-

ation." *Berlin*, 858 F.2d at 1163.[1] The status of whether a plan was under "serious consideration" and any misrepresentations concerning the employer's consideration of a plan within an employer/employee relationship is a question of fact. *Berlin*, 858 F.2d at 1164.

As observed by the *Berlin* court, the duty to avoid material misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees. *Berlin*, 858 F.2d at 1164.[2] A fiduciary "has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship." *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C.Cir. 1990). A fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process. *See e.g., Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 226 (3d Cir. 1989) (fiduciary not required to disclose status of business, as opposed to fiduciary, activities).

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[1] In *Berlin*, Michigan Bell Telephone had previously offered an early retirement incentive to its employees, and was seriously considering extending the offer again when it discussed the future availability of the incentive to its employees and told them that such a plan would not be offered. *Berlin*, 858 F.2d at 1156-61, 1164.

[2] If an employer has truthfully stated that an early retirement plan is a one-time offer, and then later decides to amend the plan, as the plan by its terms provides, for a second offering, no liability attaches to the first statement, nor to the employer's silence during the time that the decision to amend is being made. *Barnes v. Lacy*, 927 F.2d 539, 543-44 (11th Cir.), *cert. denied*, --- U.S. ----, 112 S.Ct. 372, 116 L.Ed.2d 324 (1991).

The district court's finding that GM had a VTEP-type plan for laidoff Norwood employees under "serious consideration" while it was conducting various management-Class meetings during September of 1987 is well-supported by the record. Not only was Class participation in VTEP under serious consideration during that time frame, but each rejection of the plan stimulated renewed interest and further management explorations to make it available to the Class participants.

Although *Berlin* addresses contingent and/or prospective benefit plans, GM has argued that it was confronted with a contingency it could not control: union approval. According to GM, it could not have implemented VTEP without the agreement of the UAW through the collective bargaining process. However, it was GM's serious consideration of the plan, rather than the union's approval of the plan, that triggered its fiduciary duties. Mindful of the significance and consequence of participation in VTEP by the Class, under the circumstances of the instant case, union obstacles notwithstanding, GM was impressed with a fiduciary duty to keep the Class and its members abreast of its consideration to permit their participation in VTEP so as to enable the Class members to arrive at a meaningful decision in selecting participation in an appropriate employee welfare benefit plan.

There appears to be a conflict between the court's judgment order, filed February 22, 1990, and its memorandum opinion entered on the same date. In its judgment order, the district court concluded that the Class was entitled to all the benefits of VTEP, "less all benefits received under the Supplemental Employment Benefits (SUB) buyout." However, in its memorandum order, the court directed the Class and GM to determine the amount payable to the Class based upon "VTEP-type benefits, less all benefits already paid under SUB, SUB buy-out, GIS, or any other appropriate program." The district court made no findings of fact at the conclusion

of its hearing or in the memorandum order awarding damages, filed on June 21, 1990.

Although it is not clear from the record, it appears that GM had deducted the unemployment compensation benefit payments and the Supplemental Unemployment Benefit Plan (SUB Plan) payments in calculating the Class members' SUB Buyout. The district court awarded the Class the sum of $3,651,186.21 based on GM's submitted damages calculations, which deducted not only the amounts received from the SUB Buyout, but also excluded both the unemployment compensation and the SUB Plan benefits that the Class members had received from GM. If that was what, in fact, had occurred, and regardless of the measure of compensation the district court intended to award, the damages award was improperly reduced by the amount of unemployment compensation benefit payments and SUB Plan benefit payments GM had already deducted in calculating the Class's SUB Buyout entitlement.

In the event that it was the intention of the district court to award the Class the sum it would have received had its members had the opportunity to elect VTEP rather than the SUB Buyout, then the Class has suffered a double reduction from the court's damage award. The terms of the VTEP plan negotiated and approved by the union and GM provided that there was to be no carve-out for the unemployment compensation benefit payments or the SUB Plan benefit payments already paid.[3] It appears from the record that the district

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[3] GM's statement that its calculation of damages made "up the difference of what is owed the Class Members" ignores clear evidence in GM's own records that the employees who were offered the VTEP program were not required to reimburse GM for the unemployment compensation and weekly SUB Plan payments. For example, as embodied in the agreement between GM and the UAW dated October 8, 1987, the VTEP payment reduction was

(continued...)

court found that the Class members should have been treated uniformly with those employees who had been afforded the opportunity to elect VTEP. If so, then the class should have been reimbursed for the unemployment compensation benefit payments and SUB Plan benefit payments deducted from its members' SUB Buyout, since those benefits had not been deducted from the sums paid to employees who had the opportunity to elect VTEP. In the absence of findings of fact, and in light of the conflict between the court's judgment order and memorandum order, the basis for the district court's damages award is confusing and is remanded for clarification and recalculation.

Since ERISA does not address the propriety of awarding prejudgment interest, such interest may be awarded in the discretion of the district court. *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982) (prejudgment interest appropriate in ERISA action when employer failed to meet contractual obligations to trust funds). Awards of prejudgment interest are compensatory, not punitive, and a finding of wrongdoing by the defendant is not a prerequisite to such an award. *Lodges 743 & 1746, International Association of Machinists & Aerospace Workers, AFL-CIO v. United Aircraft Corp.*, 534 F.2d 422, 447 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d. 87 (1976).

The district court, without explanation, declined to impose prejudgment interest. However, in its memorandum

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[3] (...continued)
limited to any outstanding debts owed by the employee to the corporation, "including any unrepaid *overpayments to the employee under the SUB Plan or GIS Program*." (emphasis added). By definition, these overpayments are sums in excess of the SUB Plan or collateral benefit payments the employee was otherwise entitled to receive.

opinion the court stated that "the conduct of GM does not warrant the assessment of prejudgment interest." Because an award of prejudgment interest is compensatory rather than punitive, the district court should have considered the position of the Class rather than the conduct of GM in arriving at a resolution of this issue. Thus, the denial of prejudgment interest on the damages award is remanded with instructions to support an award or denial of prejudgment interest with findings of fact incorporating its reasons for its decision.

GM has also challenged the attorney's fees awarded to the Class as excessive. GM argued that the district court erred in multiplying the lodestar figure awarded the plaintiffs' attorney by two without sufficient findings of fact to support the calculation. The Class defended the award and cross-appealed the district court's decision to set aside the contingent fee contracts.

Section 1132 provides that in any action under ERISA brought by a participant, "the court in its discretion may allow a reasonable attorney's fee and costs to either side." 29 U.S.C. § 1132(g)(1). Although the award of attorney's fees is reviewed under the abuse of discretion standard, *Perotti v. Seiter*, 935 F.2d 761, 763 (6th Cir. 1991), in order for this court to review an award, "it remains important ... for the district court to provide a concise but clear explanation of its reasons for the fee award," *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). *Woolridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1176 (6th Cir. 1990); *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 3000, 64 L.Ed.2d 862 (1980).

The district court failed to make the requisite specific findings of fact to support its fee award. The district court awarded a multiplier of two based solely upon "the reasoning of Plaintiffs' counsel in the aforementioned Application for Attorney Fees." In this application, the attorney requested a

multiplier of four, justifying the multiplier by the size of the attorney's firm, the delay in receipt for payment, and the fact that several other attorneys declined to participate in the case as outside counsel because of its risk factor. The district court's multiplier of two, which is a 200 percent enhancement of the lodestar, must be justified on the record. *Perotti*, 935 F.2d at 765. Although this court cannot assume that the district court awarded a multiplier of two for risk of contingent representation alone, to the extent the award was enhanced for the risk of contingency, it is invalid. *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

In addition, the district court provided no explanation of its decision to set aside the contingent fee contracts. Statutory awards of fees can coexist with private fee arrangements. *Venegas v. Mitchell*, 495 U.S. 82, 87-89, 110 S.Ct. 1679, 1683, 109 L.Ed.2d 74 (1990) (section 1988 does not prevent lawyer from collecting contingency fee even though it exceeded statutory award); *Blanchard v. Bergeron*, 489 U.S. 87, 96-98, 109 S.Ct. 939, 946, 103 L.Ed.2d 67 (section 1988 award although counsel paid); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, Delaware Valley (II)*, 483 U.S. 711, 726, 107 S.Ct. 3087, 97 L.Ed.2d 585 (1987) (section 1988 award although contingent fee agreement); *Blum v. Stenson*, 465 U.S. 886, 894-95, 104 S.Ct. 1541, 1546-47, 79 L.Ed.2d 891 (1984) (section 1988 award although counsel nonprofit legal aid). Thus, although an award may be enhanced to compensate for the contingency of recovery, "it is a mighty leap from these propositions to the conclusion that § 1988 also requires the District Court to invalidate a contingent-fee agreement arrived at privately between attorney and client." *Venegas*, 495 U.S. at 87, 110 S.Ct. at 1682.

ERISA's fee-shifting section, like section 1988, provides that the party, not the attorney, is eligible for and receives the statutory award. 29 U.S.C. § 1132. Just as the party may

receive an award of fees and costs, so may the party negotiate, waive, or settle that right. *Venegas*, 495 U.S. at 87-89, 110 S.Ct. at 1683. Thus, a statutory award of fees, alone, does not invalidate a contract for attorney's fees. Since the court failed to indicate why it applied a multiplier of two to the lodestar amount and why it set aside the private fee contracts between the Class and the attorneys, the fee award is reversed and remanded for a statement of detailed factual findings.

Accordingly, for the reasons expressed herein, the district court's determination of GM's liability for breaching its ERISA fiduciary duty to the Class is AFFIRMED. The award of damages and the award of attorney's fees are REVERSED and REMANDED for findings of fact and a statement of reasons.

BOYCE F. MARTIN, Jr., Circuit Judge, concurring in part and dissenting in part. I agree with the majority that General Motors Corporation breached its duty under ERISA. The company had a fiduciary duty not to make intentional or negligent misrepresentations concerning the availability of participation in an employee welfare benefit program. I also concur in the remand for a clarification of damages and a finding of fact regarding the denial of the contingent-fee contracts. I must dissent, however, from the majority's opinion concerning pre-judgment interest and the remand for factfinding on the attorney's fees.

The district court denied an award of pre-judgment interest, which is a discretionary determination. Unless the district court abused its discretion, its decision should stand. *See In re Bendectin Litigation*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006, 102 L.Ed.2d 779 (1989). In *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982), we found that a remand was appropriate because the district court failed to address the propriety of awarding pre-judgment interest. That case is distinguishable

from this case because the district court in this case specifically determined that an award of pre-judgment interest was not appropriate. Contrary to the majority's view, the district court's reasoning is sufficient to support the denial of pre-judgment interest. The majority argues that, because the district court examined General Motors' behavior, the district court was improperly applying a standard for punitive damages. My reading of the district court's decision, however, indicates that the district court simply found that GM's behavior toward the Class was not so egregious as to mandate additional, discretionary compensation through the award of pre-judgment interest. In so deciding, the district court did not abuse its discretion.

As regards the award of attorney's fees, I would affirm the district court. Under *Perotti v. Seiter*, 935 F.2d 761, 763 (6th Cir.1991), we apply an abuse-of-discretion standard of review to a district court's award of attorney's fees. The district court gave a concise and clear explanation for the fee award by adopting the reasoning of the Class in its Application for Attorney Fees. The court did not abuse its discretion because the record was complete and the court's reasons were sufficient.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOANNN DRENNEN, et al.,

Plaintiffs,

v. Civil No. C-1-88-515

GENERAL MOTORS CORPORATION

Defendant.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court after trial on January 22, 23, 24, and 25, 1990, at which time testimony and evidence was presented. Plaintiffs, representing a class of former defendant employees, seek damages against defendant for alleged discriminatory treatment arising out of the closing of the Norwood Plant of the General Motors Corporation ("GM") in August, 1987. In accordance with Rule 52, Fed. R. of Civ. P., the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law.

I. Findings of Fact

1. In the early 1920's GM established an automotive assembly plant in the City of Norwood, Ohio. Norwood is a Municipal Corporation located in Hamilton County adjacent to and completely surrounded by the City of Cincinnati. The Norwood plant functioned as an assembly plant under a GM division known as the Chevrolet\Pontiac\Canada Group

("CPC") until August, 1987, when it was permanently shut down. Structures on the premises were subsequently razed and the property sold. GM had experienced a decline in sales during the middle and late 1980's and concluded that it was necessary to shut down some of its older and less efficient assembly plants and to reduce its work force. The Norwood plant was one so designated. Information of the closing was made public in November, 1986. It terminated production and closed in August, 1987. Approximately 3700 employees were affected, approximately 2900 of whom had service with GM of ten years or more. Employees were advised by GM management that the Norwood plant would not reopen and that it was part of a company wide plan to eliminate assembly plants and to reduce the employee work force.

2. This is a class action affecting a class of former GM Norwood Plant employees who had more than 10 years of GM employment prior to being placed on layoff status in August, 1987, and who terminated their relationship with GM subsequent to their layoff by accepting a Supplemental Unemployment Benefit Buyout Plan (SUB-buyout plan).

3. At all times pertinent to this matter the United Auto Workers (UAW) acted as the collective bargaining agent for all GM employees concerned herein. It functioned through Local 674, which served as the local bargaining agent for those employees. A three year company-wide collective bargaining agreement had been negotiated between GM and the UAW in 1984, effective October 15, 1984 (Deft. Ex. G1). During 1987 a new collective bargaining agreement was negotiated becoming effective October 26, 1987 (Deft. Ex. G3). It should be noted in passing, that these agreements are complex matters and result in long and complicated documents. The contract of 1984 contained 487 pages; the contract of 1987 contained 527 pages. In addition a supplemental agreement (Deft. Ex. G2) covering the Supplemental Unemployment Benefit Plan (SUB) from October 22, 1984 contains an additional 198 pages and a

supplemental agreement covering the Guaranteed Income Stream benefit program (GIS), effective November 2, 1987, contained 99 pages. To be familiar with the entire collective bargaining agreement required an employee to understand over 800 pages of legalistic language.

4. The employees of GM were advised of matters involved in the layoff by a document known as "Information Hotline". It was circulated to them from time to time (Pltf. Ex. 1). Available to Norwood GM employees at layoff in August, 1987, were the following programs:

A) Supplemental Employment Benefits (SUB) Laid off employees are provided weekly payments in addition to the unemployment benefits paid by the State of Ohio. SUB was available for a limited period of weeks and the value of SUB payments were subject to the existence of a fund of money for that purpose.

B) Guaranteed Income Stream (GIS) - A laid off employee who wished to maintain such status would receive a GIS at the conclusion of SUB payments. These benefits would continue until the employee returned to work or became eligible for retirement.

C) SUB "Buy Out" - A Norwood employee could elect to terminate his relationship with GM and receive a cash lump sum "buy-out" of his future benefits under SUB. By doing so, he would insure himself of a sum certain at the time of electing the buy-out, but he would thereupon permanently end his existing relationship with GM. It was this alternative that all members of the plaintiff class elected.

D) *Voluntary Termination of Employment Program (VTEP)* - VTEP was available in some GM

> plants. An employee who elected VTEP received a lump sum of money in exchange for permanently terminating any relationship with GM. VTEP did not exist for the Norwood plant in August, 1987, and it could not be made available there without the agreement of both GM and UAW.

5. The choice of benefit plans available in September, 1987, presented a laid off employee with the following choice. He could continue to accept SUB and at its termination receive the benefits under GIS. In this instance, he would continue in a lay-off status until he was offered a new position or became eligible for retirement. Under the circumstances of 1987, it was highly unlikely that a new position would be available in any plant near southwestern Ohio. In this case, he would not receive a lump sum and would take the risk that the SUB fund would be depleted or that he would become ineligible for GIS. For example, he could become ineligible for GIS by refusing employment in a distant GM plant. In the alternative, he could accept a lump sum "buy-out" of SUB and thereupon terminate his relationship with GM. The alternative of accepting VTEP was not available to the plaintiff class in September, 1987, when choices were made available. By subsequent determination of GM and the UAW, neither VTEP nor a "VTEP-type plan" was ever made available to the class.

6. A series of meetings were held beginning in June, 1987, where benefits were explained to the employees. No verbatim record of any of these meetings was presented to the Court. A meeting was held on September 23, 1987, which was taped (Deft. Ex. J1). Of significance is the following statement made by an unknown GM management official.

> "So the only question is what is going to happen to the SUB fund. Nobody can really tell what is going to happen to the SUB fund. There is a lot of drain on the SUB fund because of a lot of plant closings.

> It is replenished by the plant people working, there is a rate we put in every week by the hours we will work so it will replenish itself.
> Question . . .
> . . . but the forecast of the SUB fund will take a 20% reduction on top of cube that I just showed you. If that happens next week, that figure, $28,000.00, that would be reduced again by 20% *The SUB fund is dropping quickly.*
> Question . . .
> The forecast is that it is going to continue to drop. (Transcript pp. 10, 11, 14) (Emphasis added).

This statement may be interpreted as putting the plaintiffs on notice that the SUB fund was not guaranteed and that with lay-offs in other plants, the fund might result in reduced weekly payments. It was, at least, an expression of the adage, "A bird in the hand is worth two in the bush."

7. The option to select VTEP was not available to the plaintiff class. It was not provided in the 1984 contract for Norwood nor was it made applicable to Norwood in the 1987 agreement. Efforts however to make a "VTEP-type program" available to employees in Norwood began before the plant was closed and continued thereafter. On June 23, 1987, Robert L. Andrew, then Director of Industrial Relations for the CPC group, sent a memorandum to R.F. O'Brian, General Director of Labor Relations for GM, in which he urged the allowance to "the Norwood hourly employees, a voluntary separation program, which would be patterned after the provisions of Attachment B of the jobs program" [VTEP]. (Joint Exhibit XIX) The Andrews memorandum dealt only with those Norwood employees who had ten or more years of service. He estimated that approximately 2900 of such employees out of the 3700 laid off might be eligible. Mr. O'Brian responded to Joint Exhibit XIX with a telephone call that rejected the suggestion.

8. Despite the rejection of VTEP by O'Brian, efforts continued during the summer of 1987 for such a program. Andrews met with O'Brian, in July, 1987, who requested a report by GM's Treasurer's office ("New York Treasurer's office"). Such a report was prepared with a negative recommendation (Joint Exhibits XXIX-1). In accordance with the report, Mr. O'Brian again rejected the VTEP. On July 29, 1987, Plant Manager Herbert D. Stone inquired of John Maisch, Plant Personnel Director, the status of VTEP for Norwood. On August 11, 1987, Mr. Maisch responded in a somewhat cryptic fashion as follows: "No - due to cost per Treas. Office [to] Dick O'Brian". (Deft. Ex. B). It may thus be assumed that as late as August 11, 1987, management levels above Norwood were rejecting a VTEP program.

It should be noted in passing that on Defendant's Exhibit B are notes indicating that the international UAW was not in favor of the program. On August 19, 1987, Mr. Stone recommended a further consideration of VTEP (Joint Exhibit XX) and forwarded a position paper setting forth the reasons (Joint Exhibit XXI). The position paper was signed by Herbert Stone, Plant Manager, John Maisch, Personnel Director, Ron Renkin, President UAW Local 674, and Wayne Hansford, UAW Local 674, Chairman. The following language in Joint Exhibit XX is significant: "because we feel so strongly that Norwood employees should be entitled to VTEP . . ."

9. SUB benefits were calculated on the basis of "credit units" with one credit unit equal to one week of payment. Initially, each time an employee was paid for one week of benefits, one credit unit was cancelled. Beginning, however, in July, 1987, a form of "inflation" took place whereby the credit unit cancellation rate was accelerated (Deft. Ex. F). For the group with ten years of seniority but less than fifteen, the cancellation of one unit in June, 1987, increased to two units in October, 1987. For employees with fifteen years seniority but less than twenty years of service, the cancella-

tion of one unit in June, 1987, increased to 1.43 units in the middle of September, 1987. Only for that group with seniority of twenty years or more did the one unit in June, 1987, remain one unit through December 31, 1989. This "inflation" supported an impression that it might be wiser for employees to elect to obtain a sum certain rather than accept a less than certain future value for their SUB certificates.

10. In the context of information from both GM and UAW that VTEP was not available, and that the SUB fund might be depleted, or that SUB certificates might be further devalued, members of the plaintiff's class elected a SUB buy-cut in the following numbers.

September, 1987	91
October, 1987	78
November, 1987	34
December, 1987	11
January, 1988	44
February, 1988	12
Total Class	270

(Jnt. Ex. I).

11. Despite the refusal of top GM management to adopt a VTEP-type program for Norwood, efforts continued in its behalf after the September meetings. Thomas Clarke, then General Supervisor of Personnel, was instructed by Mr. Maisch to continue pursuing VTEP benefits for local people. In November, 1987, Clarke's notes indicate that there were continuing discussions of a VTEP-type program (Pltf. Ex. 3). Notes under the heading of "11/16/87" contain the following language: "So we in Norwood are currently in a holding pattern until we get further guidance on this." [VTEP]

12. In November, 1987, a decision was made to take another look at VTEP for those employees with ten years or more seniority. Paul Schnobrick, Job Opportunity Bank-Security (JOBS) Program administer, was instructed to prepare a

report on the feasibility of VTEP for employees with more than ten years of seniority. The Schnobrick report, dated December 15, 1987, was favorable to a VTEP-type program (Joint Ex. XXX). By December, 1987, there was reason to believe that a VTEP-type plan would be approved for Norwood. On that date Clarke noted that Schnobrick "was sure it would be approved and that we would know something by Friday 12/18/87." (Pltf. Ex. 3)

13. By late January, 1988, a VTEP-type program was agreeable to the local CPC labor officials and to Local 674 (Jnt. Ex. XIV). This plan required "a carve-out" of those benefits already paid under the SUB and it was limited to employees with ten or more years of seniority who had not accepted the SUB-buyout plan.

14. In late January, Don Hooper, CPC Labor Relations, made a call to James Westness, UAW International Representative for the Norwood plant, seeking UAW approval for the VTEP-type plan. The telephone conversation apparently was less than satisfactory. The UAW refused to consider any VTEP-type program that contained a carveout and according to the courtroom testimony of Mr. Westness after delivering that ultimatum, he hung up. (See also, Jnt. Ex. XV).

15. No further progress was made until a meeting called for other purposes at Las Vegas, Nevada, brought together representatives of the UAW and GM management. This meeting occurred in early March and apparently reopened the possibility of VTEP for Norwood. This time an agreement was reached and a Memorandum of Understanding was entered into on April 12, 1988 (Joint Ex. XXXII) allowing GM employees with more than ten years of seniority to apply for a VTEP-type program. The Memorandum of Understanding, however, was not retroactive and did not include any members of the plaintiff class. GM employees were given a "window of opportunity" to elect VTEP for sixty days beginning May 2, 1988. They were also given a second

"VTEP window" beginning in late 1988 and continuing through March 31, 1989. In neither window of opportunity was such benefit extended to members of the plaintiff class.

II.
OPINION

The events of 1987 and early 1988 presented plaintiffs with a classical dilemma: Either take a sum certain and terminate their employment with GM or gamble and hope that regular payments under SUB would be available and that prospective future employment with GM would arise. Those who gambled apparently won and those who did not, clearly lost. At no time, however, during the decision period which extended from approximately August, 1987, through February, 1988, was either group ever told of the possibility that a VTEP-type program would be offered. The likelihood of such payments became apparent in December, 1987.

It may be asserted, as Defendants have done, that GM management was not so required to inform its employees. The same, however, is not true of the UAW. Its conduct in this matter was something less than admirable. Faced with an obligation of properly representing those persons who had been members of the local bargaining unit and had contributed dues for its support, neither the local nor the international ever informed its members that continuing discussions of VTEP were going on and instead passively watched the members of the plaintiff class accept a buyout unaware of those negotiations. Indeed some members of the class of plaintiffs were denied an opportunity for VTEP by the unwillingness of a UAW representative even to discuss that opportunity with GM management. (See Findings of Fact 14).

This is not to suggest that defendant GM is free of blame. The plaintiff class appears to be victim of the antagonistic nature of labor and management dealings in the automotive industry since the late 1930's.

In the last three decades, we have seen a greater awareness of the concept by prohibitions against "discrimination" by sex, age, race, and religion. Discrimination is merely an indication of a growing awareness that the different treatment of similarly situated people is unfair.

The current concept may be described as a belief by society that all persons should be treated alike. We draw upon analogies from sports to better illustrate this deeply held view. We speak of a "level playing field" and "of changing the rules while the ball is in play." We grope for a better articulation of this belief and end up with only analogies.

There is a countervailing principle involved here as well. Defendant GM was *not* required to institute a VTEP. Had nothing been done, the complaint of the plaintiff class would have been dismissed on the pleadings. GM did not owe these workers or any other individual, an opportunity to participate in VTEP. The essence of plaintiffs case however is that, GM *did* make VTEP available to some employees and not others. The group eligible for VTEP ultimately included all persons who had ten or more years of service with GM. Each member of plaintiffs' class qualified. If that is the "universe" contemplated by GM, the passage of time only reduced it by those persons unable to wait or those persons induced or encouraged to "cash-in" by statements of GM officials as indicated by Findings of Fact 6.

It is easy to suggest in hindsight[1] that the SUB fund did not disappear and the there was no further "devaluation" of SUB unit certificates. Those employees who gambled on the future, won. They were ultimately presented with the VTEP

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[1] The term "hindsight" may be equated with the phrase "duty of clairvoyance," which the Hon. H. Ted Milburn refers to in *Berlin v. Michigan Bell Telephone*, 858 F.2d 1154, 1164 (6th Cir. 1988). Judge Milburn considered this to be a matter for the District Court in the first instance.

alternative. Those who could not or would not gamble, lost. There was no VTEP waiting for them. In effect, this was a war of attrition - only those who could holdout were rewarded. The net result is that a discrete group, employees with ten or more years of service, were artificially divided and treated differently.

One is reminded of the essay by Learned Hand entitled "The Contribution of an Independent Judiciary to Civilization," in which the following appears: "You may ask what then will become of the fundamental principles of equity and fairplay *which our constitution enshrines* . . . " [emphasis added]. What has been described in the findings of fact, simply was not fair. The foregoing, however persuasive on a "common law" basis, is not the only basis upon which this Court relies.[2] The specific legal underpinning for the conclusion that the plaintiff class has been dealt with unfairly, is in reference to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, which imposes a fiduciary duty upon employers in the administration of an "employee welfare benefit program." 29 U.S.C. § 1104. Definitions contained in 29 U.S.C. §§ 1002(1), 1002(2), and 1002(7) and the Sixth Circuit opinion in *Berlin v. Michigan Bell Telephone*, 858 F.2d 1154 (6th Cir. 1988), convince the Court that the offering of VTEP or a VTEP-type program, as found herein, involve the strictures of ERISA, as an employee welfare benefit program, and entitle the plaintiff class to be dealt with in a fiduciary fashion.

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[2] Although not necessarily in the proper context, the Supreme Court has alluded to a Congressional intent of allowing the Courts to develop a federal substantive law in relation to ERISA. *See, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1986); *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1982).

There are three components of ERISA's fiduciary requirement. *Id.* at 1162. The first is the duty of loyalty which requires all of the fiduciary's decisions regarding ERISA plans to be made "with an eye single to the interests of the participants and beneficiaries." *Id.* (citations omitted).

The second component is known as the "prudent man" fiduciary obligation.

> This stems from the language . . . requiring a plan fiduciary to act with the care, skill, prudence, and diligence that a prudent man acting in a like capacity would use in conducting an enterprise of like character. The prudent man standard, combined with the duty of loyalty 'imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation. These familiar principles evolved from the common law of trusts that Congress codifies and made applicable to ERISA trustees.'

Id. quoting, *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984). The final component, is that the fiduciary "must act for the exclusive purpose of providing benefits to plan beneficiaries." *Berlin*, 858 F.2d at 1162.

Although the court in *Berlin* remanded the district court's summary judgment for further factual findings, its legal premise is on point in this case. The Court held that in a situation where a fiduciary is seriously considering the offering of second retirement plan, which would be preferred to the one currently being offered, there is a "duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering." *Id.* at 1163-64.

Under this analysis, two issues of fact must be decided. First, the Court must decide "when serious consideration of the . . . offering took place, and [secondly], whether or not any material misrepresentations were made to potential plan participants concerning the . . . offering." The first question is not difficult to decide in the context of this case. The evidence shows that at all times relevant, i.e. before the SUB-buyout was offered in September, 1987, the Norwood CPC management was seriously advocating a VTEP-type plan be implemented. However, at the same time, management at the national level was not being cooperative until November, 1987. In the context of this case, where hope of receiving a VTEP-type plan would bear heavily upon a persons decision to accept the SUB-buyout, this Court holds that the efforts of the local management in pursuing a VTEP-type plan for the Norwood plant was a "serious consideration."[3]

The second question is easier to decide once the first finding has been made. Although GM did not make any truly false statements without the benefit of hindsight, GM did mislead the employees of the Norwood plant by not disclosing that a VTEP-type plan would be offered or even that the local management was pursuing such a plan. In such a situation, where the livelihoods of some 2900 employees were at stake, GM should have at least mentioned the progress and efforts of the local management, instead of just presenting a grim outlook as to future benefits. Such a withholding is obviously material.

---

[3] It should be noted that before a VTEP type plan could be implemented, the UAW's approval was necessary. Although this is true, the Court finds that it was local GM management that initially proposed the idea of a VTEP-type plan for Norwood. Therefore, the "serious consideration" requirement is met by the Norwood CPC management's actions.

In accordance with the foregoing, the Court believes that plaintiff class is entitled to the benefits of VTEP but not both VTEP and the SUB-buyout. Plaintiffs should be each awarded such VTEP benefits to which each is entitled in accordance with the Memorandum of Understanding (Jnt. Ex. XXXII) minus all benefits already received from the SUB, SUB-buyout or GIS. The Court determines that the conduct of GM does not warrant the assessment of prejudgment interest.

III.
CONCLUSIONS OF LAW

A. This Court has jurisdiction pursuant to 29 U.S.C. 1132(e) of the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq.

B. There is an obligation upon an employer to avoid discriminating among employees similarly situated. Encouraging such employees to take action which later penalizes them in a financial fashion is a violation of such a duty of fairness.

C. In accordance with the Employees Retirement Income Security Act 29 U.S.C. § 1001 *et seq.*, there is a fiduciary obligation imposed upon an employer to deal with its employees in an appropriate fashion. 29 U.S.C. § 1104.

D. An encouragement by an employer, upon a group of employees to select termination benefits, while such employer continues to negotiate for better termination benefits, without advising such employees, is a violation of the fiduciary duty.

E. The conduct described in Conclusion of Law D is likewise a violation of the common law duty of an employer not to discriminate, and to treat all comparable employees in an equitable fashion.

F. In view of the foregoing the Court finds that the plaintiff class is entitled to termination benefits as described

in the Voluntary Employee Termination Program (VTEP) less all benefits received under the Supplemental Employment Benefits (SUB) buyout. Let judgment issue in accordance with the foregoing.

IT IS SO ORDERED.

Carl B. Rubin, Chief Judge
United States District Court

APPENDIX E

29 U.S.C. §§ 1104, 1108(c)

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) --

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement --

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of qualified replacement plan, any requirement --

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection --

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

§ 1108(c). Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from --

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

APPENDIX F

The following is a list of General Motors Corporation's affiliates and subsidiaries, other than wholly-owned subsidiaries.

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
AC Bakony Kft. (Hungary)	51%
ACCSCO S.A. (Belgium)	27.415%
ACE Limited (Cayman Islands)	.001%
AMBRAKE Corporation (USA)	50%
AMRAAM International Licensing Company (USA)	50%
ASK Computer Systems, Inc. (USA)	19.6%
AeroVironment, Inc. (USA)	15%
American Mobile Satellite Corporation (USA)	26.5%
Applied Intelligent Systems, Inc. (USA)	2.3%
Aralmex, S.A. de C.V. (Mexico)	40%
Arinc Incorporated (USA)	.001%
Aristacom International, Inc. (USA)	4.2%
Asset Leasing GmbH (Germany)	95%
Aura Srl (Italy)	75%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)	45.9%
Banque de Credit General Motors (France)	98.26%
Behaviortech, Inc. (USA)	6.63%
Beijing International Information Processing Company Limited (Peoples Republic of China)	51%
Bujias Mexicanas, S.A. de C.V. (Mexico)	40%
CAMI Automotive, Inc. (Canada)	50%
CAPSCO Software Canada, Ltd. (Canada)	20%
CEI Co., Ltd. (USA)	49%
CLS Corporation (USA)	10%
Calsonic Harrison Co., Ltd. (Japan)	49%
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG (Germany)	94%
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG (Germany)	94%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Centigram Communications Corporation (USA)	4%
China Management Systems Corporation (China)	50%
Cilva Holdings Plc. (England and Wales)	26.5%
Cimflex Teknowledge (USA)	3.1%
Coalition Undertaking Remedial Efforts, Inc. (USA)	2%
Comau Productivity Systems, Inc. (USA)	20%
Comlinear Corporation (USA)	16%
Compagnie des Faisceaux Tunisiens International S.A. (Tunisia)	24%
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)	40%
Componentes Delfa, C.A. (Venezuela)	49%
Comtrac Corporation (USA)	5%
Constructora Venezolana de Vehiculos, C.A. (Venezuela)	49%
Controladora General Motors, S.A. de C.V. (Mexico)	99%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Convesco Vehicles Sales GmbH (Germany)	60%
DHB-Componentes Automotivos S.A. (Brazil)	49%
DRB s.a./n.v. (Belgium)	51%
Daewoo Automotive Components, Ltd. (Korea)	50%
Delkor Battery Company, Ltd. (Korea)	50%
Detroit Diesel Corporation (USA)	20%
Diavia s.p.A. (Italy)	75%
EDESA Societe Anonyme Holding (Luxembourg)	1.2%
ELTRO GmbH (Germany)	26.18%
EPEC S.A. (Brazil)	50%
Earth Observation Satellite Company (USA)	50%
ELEKLUFT Elektronik-und Luftfahrtgerate GmbH (Germany)	26%
Emperion Corporation (USA)	50%
Empresa Mixta GEMACVEN, S.A. (Venezuela)	49%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Empresa Nacional de Optica S.A. (Spain)	40%
FLIR Systems, Inc. (USA)	37.7%
Federal Integrated Systems Corporation (USA)	50%
First City Bancorporation of Texas, Inc. (USA)	2%
Freevale Limited (England)	29%
G & F Company (USA)	50%
GM Nigeria Limited (Nigeria)	30%
G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial (Colombia)	99.9%
General Motors Bankgesellschaft m.b.H. (Austria)	74%
General Motors Colmotores, S.A. (Colombia)	82.6%
General Motors del Ecuador S.A. (Ecuador)	99%
General Motors Egypt (Arab Republic of Egypt)	51%
General Motors France Automobiles S.A. (France)	99%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
General Motors Hungary Automotive Distribution Limited Liability Company (Hungary)	67%
General Motors Hungary Automotive Manufacturing Limited Liability Company (Hungary)	67%
General Motors Kenya Limited (Kenya)	49%
General Motors de Mexico, S.A. de C.V. (Mexico)	90%
Genie Mecanique Zairois, S.A.R.L. (Republic of Zaire)	20%
Guiado y Control SA (Spain)	40%
H & D Radio Frequency Identification Products (USA)	50%
H & R Company (USA)	50%
HBH Company (USA)	33-1/3%
HFS Holdings, Inc. (USA)	6%
HKV (USA)	50%
Healthco Holding, Inc. (USA)	1%
Hitachi Data Systems Holding Corporation (USA)	20%
Hughes-JVC Technology Corporation (USA)	est. 66%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Hughes-Kenwood RDSS, Inc. (USA)	50%
Hughes Software Systems Private Limited (India)	80%
IBC Vehicles Limited (United Kingdom)	60%
I.K. Coach Co., Ltd (Japan)	70%
ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)	67%
Ilmor Engineering, Inc. (USA)	25%
Ilmor Engineering, Ltd. (England)	25%
Industries Mecaniques Maghrebines, S.A. (Tunisia)	14.7%
Industrija Delova Automobila, Kikinda (Yugoslavia)	49%
Interactive Entertainment, Inc. (Canada)	1.213%
International Electro-Optical Industry Anonim Sirketi (Turkey)	50%
Interpractice Systems, Inc. (USA)	50%
Isuzu-General Motors Australia Limited (Australia)	40%
Isuzu Motors Limited	37.5%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Japan Communications Satellite Company, Inc. (Japan)	30%
Japan Satellite Communications Network Corporation (Japan)	10%
Japan Systems Kabushiki Kaisha (Japan)	19.9%
Jinbei GM Automotive Co. Ltd. (China)	30%
Kabeltrommel GmbH & Co. KG (Germany)	4.6%
Kabelwerke Reinshagen GmbH (Germany)	97.9%
Kabelwerke Reinshagen Werk Berlin GmbH (Germany)	94%
Kabelwerke Reinshagen Werke Neumarkt GmbH (Germany)	94%
LEA GP Incorporated (USA)	86%
Light Helicopter Turbine Engine Company (USA)	50%
MET (USA)	50%
Mercel AB (Sweden)	40%
Metal Casting Technology, Inc. (USA)	51%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Microelectronics and Compauter Technology Corporation (USA)	4%
Millbrook Pension Management Ltd. (England)	99%
Motor Enterprises, Inc. (USA)	42.86%, but 100% of voting stock
NCRS Holdings Inc. (USA)	74-80%
National Car Rental System, Inc. (USA)	45%
Neodata Holdings, Inc. (USA)	51%
New Cure, Inc. (USA)	1.5%
New United Motor Manufacturing, Inc. (USA)	50%
New Venture Gear, Inc. (USA)	36%
Nippon Avionics Co., Ltd. (Japan)	10.03%
Nippon EDS Co., Ltd. (Japan)	51%
Omnibus BB Transportes, S.A. (Ecuador)	30.9%
Opel-Automobilwerk Eisenach-PKW GmbH (Germany)	80%
Opel-Handler Versicberungsdienst GmbH (Germany)	25%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Opel-Wohnbau GmbH (Germany)	99%
P.T. Mesin Isuzu Indonesia (Indonesia)	35%
PDES, Inc. (USA)	10%
Pacific Monolithics, Inc. (USA)	11%
Packard CTA Pty. Ltd. (Australia)	60%
Packard Electric Vas kft (Hungary)	60%
Penske Transportation, Inc. (USA)	5.4%
Perceptron (USA)	17.5%
Postal Buddy Corporation (USA)	3.75%
Promotora de Partes Electricos Automotrices (Mexico)	40%
Riser Foods, Inc. (USA)	1.3%
Robotic Vision Systems, Inc. (USA)	19.5%
Ruedas de Aluminio, C.A. (Venezuela)	15.1%
Saab Automobile AB (Sweden)	50%
Senalizacion y Accesorios del Automovil Yorka, S.L. (Spain)	41.76%
Shinsung Packard Company, Ltd. (Korea)	50%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
Simpad, Sociedad Anonima de Capital Variable (Mexico)	40%
Sociedad de Comercializacion Internacional Colmotores S.A. (Colombia)	49%
Societe Francaise des Amortisseurs de Carbon S.A. (France)	60%
Soft-Switch, Inc. (USA)	7%
Subaru-Isuzu Automotive, Inc. (USA)	49%
Sung San Company, Ltd. (South Korea)	50%
Suzuki Motor Corporation (Japan)	3.5%
Systems Control Technology, Inc. (USA)	49%
Systems Technology Management Corporation (Korea)	50%
Telecommunications Data Services, Incorporated (USA)	20%
Thomas Group, Inc. (USA)	25.8%
Truck and Bus Engineering U.K., Limited (USA)	74%
UKADGE Systems Limited (United Kingdom)	33-1/3%

Company (Country of Incorporation in Parentheses)	% of Ownership of Voting Stock by GM or GM Entity
United Australian Automotive Industries Limited (Australia)	50%
Uveral S.A. (Uruguay)	5%
Vanguarda Componentes Automotivas, S.A. (Brazil)	50%
View Engineering, Inc. (USA)	14.8%
Volvo GM Canada Heavy Truck Corporation (Canada)	24%
Volvo GM Heavy Truck Corporation (USA)	24%
Westcott Communications, Inc. (USA)	25.6%
Woodbridge Foam Deutschland, GMBH (Germany)	20%

Supreme Court, U.S.
FILED
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No. 92-1607

In The

Supreme Court of the United States

October Term, 1992

GENERAL MOTORS CORPORATION,

Petitioner,

v.

JOANN DRENNAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court and the Court of Appeals correctly hold that General Motors breached its fiduciary duties in violation of ERISA when the evidence demonstrated that General Motors misled the Plaintiffs by representing that an employee benefit plan known as VTEP would never be offered to the laid off employees of the Norwood, Ohio GM plant at a time when General Motors had VTEP under serious consideration for such employees?

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No. 92-1607

In The

Supreme Court of the United States

October Term, 1992

GENERAL MOTORS CORPORATION,

Petitioner,

v.

JOANN DRENNAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

1. The Decision to Close the Norwood GM Plant

In November, 1986, Herbert D. Stone attended a meeting in Warren, Michigan to discuss the prospect of plant closings within GM's Chevrolet-Pontiac-GM of Canada Group. ("CPC Group") (R.115: Stone at TR Day 3, p. 67). GM's Norwood plant was one of 27 plants within the CPC Group. (R.113: Andrew at TR Day 1, p. 38). Stone was Plant Manager of the Norwood Plant. (R.115: Stone at TR Day 3, p. 66). At that meeting, GM announced that it had decided to close the Norwood Plant. (R.115: Stone

at TR Day 3, p. 68). GM ordered Stone to inform the Norwood employees of that decision. (R.115: Stone at TR Day 3, p. 68).

As a result, Stone announced to each of the two shifts on November 16, 1986 that the Norwood plant would close. (Stone Depo., p. 18). Later, GM announced that the Norwood plant would cease production on August 26, 1987. (R.115: Stone at TR Day 3, p. 68). In order to prepare for the plant closing, Stone was directed to explore the various benefits that were available and to explain those benefits to the Norwood employees. (R.115: Stone at TR Day 3, p. 68).

There are two employee benefit plans relevant to the case at bar: the Supplemental Unemployment Benefit Plan ("SUB Plan") and the Voluntary Termination of Employment Program ("VTEP"). Plaintiffs alleged that they were misled by GM into believing that VTEP would never be offered and, therefore, accepted a buyout of their benefits under the SUB Plan ("SUB buyout"), under which they received significantly less valuable benefits. The District Court found from the evidence that that is exactly what happened in the case at bar. (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 16). The Court of Appeals affirmed.

2. Explanation of the Relevant Benefit Plans

Under the existing SUB Plan, eligible employees were entitled to receive a supplement to their state unemployment pay. SUB plan payments were paid on a weekly basis for a limited period of weeks. (R.70: Appendix E,

Joint Ex.II-5; R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 4, p. 3). The SUB Plan is based on a limited funding arrangement, under which weekly SUB benefits are paid from a trust fund. (R.113: Bennett at TR Day 3, p. 94). The amount of money paid into the SUB fund is based on the number of hours worked during a week. (*Id.*). Thus, if GM reduces its production or implements a layoff, the amount contributed to the SUB fund is reduced. (R.113: Bennett at TR Day 3, p. 95).

Reduced contribution to the SUB fund directly translates into reduced weekly payments to the employee. (R.113: Bennett at TR Day 3, p. 104). An employee's weekly SUB payment is based on the employee's credit units and the credit unit cancellation rate. (R.113: Bennett at TR Day 3, pp. 101-104). As SUB fund assets decline, the credit unit cancellation rate increases. (*Id.*). This results in the laid-off employee's receipt of a smaller weekly payment. Once the employee's credit units have been exhausted, he can no longer receive SUB payments. (R.115: Bennett at TR Day 3, p. 101).

After exhaustion of SUB Plan's weekly payments, an employee with ten or more years of seniority becomes eligible for GIS. (R.70: Appendix E, Joint Ex. II-45; R.71: Findings of fact, Opinion, and Conclusion of Law, Finding of Fact No. 4, p. 4-5). GIS, like SUB Plan, offered weekly payments to eligible employees, (R.15: Bennett at TR Day 3, p. 110). Continued receipt of GIS was, however, contingent upon numerous requirements. For example, an employee would lose his entitlement to GIS if he refused a job offer at any GM plant, no matter how distant. (R.115: Bennett at TR Day 3, p. 127; R.71: Findings

of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 5, pp. 4-5).

Because of the diminishing value of the weekly SUB payments and the uncertain availability of GIS, many employees inquired about the possibility of a lump sum buyout of their benefits. The SUB Plan provided for a lump sum payment to employees in exchange for which the employees terminated their employment with GM. (R.70: Amended Appendix G, Defendant's Ex. G-2, pp. 56, 67). Normally, an employee had to be on layoff for 12 months to receive this SUB buyout. (*Id.*). GM, however, agreed to waive this waiting period for layoffs resulting from the plant closing in September, 1987 and allowed for a buyout of one's SUB Plan benefits. (R.113: Andrew at TR Day 1, p. 82).

Many employees asked GM representatives about the availability of another lump sum buyout known as VTEP. (R.113: Andrew at TR Day 1, p. 53). VTEP also requires that an employee terminate employment with GM in exchange for the lump sum payment. (*Id.*). Eligible employees could receive VTEP benefits from GM, ranging from $35,000.00 to $55,000.00, depending upon the employee's seniority. (R.70: Amended Appendix G, Defendant's Ex. G-1, p. 204). VTEP, thus, offered more money to laid-off employees than did the SUB buyout. Although employees of GM's Norwood plant were not contractually entitled to receive VTEP (R.113: Andrew at TR Day 1, p. 105), GM management seriously considered an offer of VTEP to Norwood employees, and eventually offered VTEP, but misled the employees into believing that VTEP would never be made available. (R.71: Findings of Fact, Opinion, and Conclusions of Law, pp. 15-16).

3. GM Begins Serious Consideration of VTEP

As the District Court found, serious consideration of an offer of VTEP began long before the SUB buyout was offered in September, 1987. (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 15). Between November, 1986, when the plant closing was announced, and March, 1987, plant manager, Herbert Stone, had discussions with Dick Huber, CPC Personnel Director, and Kenneth Gallinger, CPC Director of Industrial Relations-Plants, pertaining to employee benefits. (Stone Depo., pp. 24-25). During this same time period, Stone had discussions with his staff at the Norwood plant, particularly John Maisch, plant Personnel Director, and Tom Clarke, plant General Supervisor of Personnel. (R.113: Maisch at TR Day 1, p. 109; R.113: Clarke at TR Day 1, p. 153). Stone requested Maisch and Clarke to pursue the availability of VTEP for Norwood employees. (R.113: Maisch at TR Day 1, pp. 109-110; R.113: Clarke at TR Day 1, p. 154). He also specifically discussed VTEP with Dave Campbell, Vice President of Manufacturing for CPC Group. (R.115: Stone at TR Day 3, p. 80). Maisch and Clarke decided that Clarke should pursue VTEP with CPC headquarters. (R.113: Clarke at TR Day 1, p. 154).

Clarke contacted CPC headquarters in an effort to ascertain what needed to be done to obtain VTEP for the Norwood employees. (R.113: Clarke at TR Day 1, p. 154). In April or May, 1987, he contacted Rodney Andrew, Director of Industrial Relations for GM's CPC Group, (R.113: Clarke at TR Day 1, p. 155; R.113: Andrew at TR Day 1, p. 37), in an attempt to obtain VTEP for the

Norwood employees. (R.113: Clarke at TR Day 1, p. 115). Andrew expressed concern with the large number of employees to be placed on layoff and the fact that many of them would be GIS-eligible. (R.113: Andrew at TR Day 1, p. 50). Thus, he had been searching for alternatives as to how GM could deal with the large number of employees to be laid off. (R.113: Andrew at TR Day 1, p. 51). Andrew had looked at VTEP, believing that it might present GM with an opportunity to better handle the large number of layoffs resulting from the closure of the Norwood plant. (R.113: Andrew at TR Day 1, p. 52). Andrew, therefore, agreed with Norwood management's requested attempt to make VTEP available to the Norwood employees. (R.113: Andrew at TR Day 1, p. 54).

On June 23, 1987, Andrew sent a memorandum to Richard F. O'Brien, GM's General Director of Industrial Relations, urging GM to make VTEP available to Norwood employees. (R.113: Andrew at TR Day 1, pp. 57-58, Joint Ex. XIX; R.116: O'Brien at TR Day 4, p. 75). GM's Industrial Relations Staff, which O'Brien directed, was responsible for dealing with all GM hourly employees. (O'Brien, Depo., p. 13). O'Brien reviewed Andrew's memorandum and also directed Richard Fleming to review it. (O'Brien Depo. pp. 19-20). Fleming was Assistant Director of Labor Relations, Industrial Relations Staff, with responsibility for the Norwood plant. (*Id.*). Shortly after receiving this memorandum, O'Brien informed Andrew that GM was not willing to offer VTEP for Norwood. (R.113: Andrew at TR Day 1, p. 62; R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 7, p. 6). Andrew communicated O'Brien's decision to Norwood management. (R.113: Andrew at TR Day 1, p. 63).

Despite O'Brien's action, efforts to obtain VTEP continued throughout the summer of 1987. (R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 8, p. 6). Stone continually contacted Andrew to inquire as to the status of VTEP. (R.113: Andrew at TR Day 1, pp. 66-68). As O'Brien testified, Stone would not take no for an answer. (O'Brien Depo., p. 27). Andrew also persisted in his efforts. He pressed the VTEP issue with O'Brien and David Campbell, CPC's Vice-President of Operations, whenever he had the opportunity to speak with them. (R.113: Andrew at TR Day 1, pp. 39, 66-68). He even took up the issue with O'Brien's superior, Alfred Warren, Vice-President, Industrial Relations Staff, on two or three occasions. (R.113: Andrew at TR Day 1, p. 77; O'Brien Depo., p. 12).

O'Brien agreed to take another look at the issue of VTEP for Norwood employees. (O'Brien Depo., p. 29). O'Brien requested GM's Treasury Office in New York to provide him with a financial analysis of VTEP versus a SUB buyout. (*Id.*). The Treasurer's report was completed and sent to O'Brien on or about August 18, 1987. (O'Brien Depo., p. 31). This report concluded that a SUB buyout was as financially attractive to employees desirous of separating from GM as VTEP and that an offer of VTEP would not result in any significant long-term savings to GM. (Joint Ex. XXIX). Therefore, at a meeting on August 19, 1987, O'Brien again informed Andrew that GM was not interested in offering VTEP to Norwood employees. (R.113: Andrew at TR Day 1, pp. 66-70).

Andrew notified Stone and Clarke of the results of that meeting. (Stone Depo., p. 64). Stone and Clarke believed the Treasurer's report to be flawed in that it was

based on erroneous assumptions about the condition of the SUB fund and, therefore, reached an incorrect conclusion. (Stone Depo., pp. 57-59). Stone and Clarke continued throughout the Fall of 1987 to try to obtain VTEP for Norwood employees. Andrew also persisted in his efforts. (R.113: Andrew at TR Day 1, pp. 77-78). Despite these rejections, the issue of whether VTEP would be made available may have seemed dead in the water, but it never sunk. (R.113: Clarke at TR Day 1, pp. 168-169). As Clarke candidly admitted, the VTEP proposal for Norwood was always an issue. (*Id.*).

4. GM conducts a Series of Meetings to Explain Severance Benefits

Shortly after the Norwood plant closed, GM decided to offer SUB buyout to Norwood employees. (R.113: Maisch at TR Day 1, p. 146). Clarke sent a notice to all Norwood hourly employees on or about September 15, 1987, informing them that a series of meetings would be held during the week of September 21 through 25, 1987, to discuss the SUB buyout offer. (R.113: Clarke at TR Day 1, pp. 162-164; Joint Ex. IV). At the time of the meetings, GM projected that the SUB fund's condition would worsen, causing a diminution of the amount of weekly SUB payments. (R.113: Clarke at TR Day 1, p. 163).

Prior to these meetings, Gallinger instructed Maisch that if a question arose about VTEP, Norwood management would be out of line if they even suggested that VTEP was a possibility. (R.113: Maisch at TR Day 1, p. 118). As a result, neither Maisch nor anyone acting under his direction ever informed the hourly employees

that VTEP was still being pursued. (R.113: Maisch at TR Day 1, p. 130). This instruction was given and followed, despite the fact that the meetings' purpose was to inform employees of their options (R.113: Maisch at TR Day 1, p. 126) and that VTEP was still being requested. (R.113: Clarke at TR Day 1, pp. 168-169, 173).

At the meetings, GM emphasized that the SUB fund was dropping rapidly and that weekly SUB payments would soon be reduced. (R.114: Partin at TR Day 2, p. 88; R.114: Drennan at TR Day 2, p. 99). The employees were, thus, encouraged to take the SUB buyout. (R.114: Allen at TR Day 2, pp. 63-64; R.70: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 6, pp. 5-6).

The members of the audience asked on several occasions whether VTEP would be made available. (R.223: Clarke at TR Day 1, pp. 167-168). GM responded that VTEP had been turned down and that it was "dead in the water." (*Id.*). GM repeatedly told the employees that the SUB buyout was the best buyout that would be offered and that nothing else would be made available. (R.114: Allen at TR Day 2, pp. 64, 70, 77; R.114: Partin at TR Day 2, pp. 88-89). Clarke, who was placed in charge of these meetings, specifically stated that GM would offer only the SUB buyout and that VTEP would not be made available. (R.114: Drennan at TR Day 2, pp. 99-102). From this evidence, the trial court concluded that GM misled these employees, (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 16).

5. GM Decides to Offer VTEP

After the September meetings and continuing into early 1988, Plaintiffs seriatim elected to accept the SUB buyout, thereby terminating their employment and seniority with GM. (*Id.*, Finding of Fact No. 10, p. 8; Joint Ex.I). All the while, however, GM, still had VTEP under serious consideration. (*Id.*, Finding of Fact No. 11, pp. 8-9).

In September or October, 1987, Maisch again approached Gallinger with the VTEP question. (R.113: Maisch at TR Day 1, p. 129). Stone instructed Maisch and Clarke to continue their pursuit of VTEP. (*Id*). After the September meetings, Clarke had additional discussions with CPC officials regarding a VTEP proposal for Norwood, (R.113: Clarke at TR Day 1, p. 168) and his notes of November 16, 1987 state that "[w]e in Norwood are currently in a holding pattern until we get further guidance on this." [VTEP]. (R.113: Clarke at TR Day 1, p. 173).

In mid-November, 1987, Gallinger instructed Paul Schnobrick to perform another analysis of whether VTEP should be offered at Norwood. (R.116: Gallinger at TR Day 4, p. 16). Schnobrick performed this cost analysis, concluding that it was to GM's financial advantage to offer VTEP to Norwood employees with ten or more years of seniority. (Schnobrick Depo., pp. 29-30; Joint Ex. XXX). In December, Rick Fleming of GM's Industrial Relations Staff responsible for CPC Group, contacted O'Brien about VTEP for Norwood and O'Brien authorized him to pursue it. (R.116: O'Brien at TR Day 4, pp. 76-80). By December 15, 1987, there was reason to believe that VTEP would be approved. (R.113: Clarke at

TR Day 1, p. 76; Plaintiffs' Ex.3). GM continued to take applications for the SUB buyout during this time (R.113: Clarke at TR Day 1, p. 174), but never disclosed that any activity pertaining to VTEP was being undertaken. (*Id.*). In fact, William Price, who assumed Clarke's responsibilities in February, 1988, testified that GM continued to accept SUB buyout applications during this time, but did not disclose that VTEP had been approved. (R.114: Price at TR Day 2, pp. 156-174). Indeed, he specifically told employees that VTEP would not be offered. (*Id.* at pp. 170-172). Finally, on April 12, 1988, GM and the UAW entered into a Memorandum of Understanding formalizing their agreement to make VTEP available to Norwood employees with ten or more years of seniority. (Joint Ex.XXXII).

GM did not permit Plaintiffs to participate in VTEP. Nor did GM permit Plaintiffs to participate in a second VTEP offering in June, 1988 to Norwood employees with 10 years of seniority, which is still open. (R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 15, p. 10; R.114: Price TR Day 2 at pp. 184-189.

SUMMARY OF ARGUMENT

Throughout its Petition for Certiorari, GM presents a number of irrelevant legal arguments in an effort to divert this Court's attention from the essential injustice which GM chose to inflict upon its employees. In its Petition, GM castigates the District Court for its statement that GM's conduct "simply was not fair." (petition, pp. 6-7). However, neither the District Court nor the

Court of Appeals grounded their decisions on vague notions of fairness as GM represents. Rather, the District Court held that GM, in the overall context of the plant closing, with its repeated representations that VTEP would never be offered and that the SUB fund was rapidly dwindling, misled Plaintiffs as to the availability of VTEP. As recognized by the District Court and the Court of Appeals, such misleading conduct is not only unfair, but is inconsistent with the duties imposed upon an ERISA fiduciary. Indeed, it is incongruous to argue that one can simultaneously mislead employees and satisfy ERISA's fiduciary duties, as GM suggests in this case.

GM's entire basis for seeking review in this Court is based upon a complete misstatement of the holdings of the District Court and the Court of Appeals. Among its findings, the District Court concluded that GM misled Plaintiffs by stating that VTEP was "dead in the water" and that the SUB buyout was the best buyout that would be offered. GM representatives specifically stated that VTEP would never be made available to Norwood employees. Despite these representations, GM Norwood plant management had previously begun efforts to obtain VTEP, which efforts the District Court deemed "serious consideration" within the moaning of *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). in *Berlin*, the Sixth Circuit Court of Appeals held that once an employer has a plan under serious consideration, the employer acts as a fiduciary when making representations about the future availability of that plan. Any misrepresentations made, either negligently or intentionally, constitute a breach of the fiduciary duties imposed by

ERISA, 29 U.S.C. §1104. Relying on *Berlin*, both the District Court and the Court of Appeals held that GM's conduct violated its duties as an ERISA fiduciary.

GM's contention that the District Court and the Court of Appeals imposed a duty of disclosure is simply not supported by the record in this case. The testimony offered at the District Court demonstrated that GM represented that VTEP would not be offered when, in fact, VTEP was under serious consideration by GM. For example, Joann Drennan testified as follows:

> Q: Now, going back to the first meeting, did Mr. Clarke say anything about VTEP?
>
> A: Only when asked questions about it.
>
> Q: What did he say when he was asked questions about it?
>
> A: Mr. Clarke said VTEP was not an option for us, and people continued asking questions about it.
>
> Q: About VTEP?
>
> A: Yes. And he got irritated, and he didn't want to answer no more questions. He just said it was not an option for us, that we would not get it.

(R.114: Drennan at TR Day 2, p. 100). Jerry Allen, another GM worker, also testified that, at the meetings, Norwood GM management was "asked directly by people in the crowd if at any time we would be offered VTEP buyout, and they told us absolutely not . . . " (R.114: Allen at TR Day 2, pp. 72-73). Herman Partin also testified that GM stated that the employees would never get VTEP. (R.114: Partin TR Day 2, p. 88).

Based on this, and other similar testimony, the District Court found that GM misled its employees. (R.71: Findings of Fact, Opinion and Conclusions of Law, p. 16).[1] Relying on *Berlin*, the District Court recognized that GM had a "duty not to make misrepresentations" (*Id.*, p. 15) and held that GM breached that duty. (*Id.*) The District Court concluded that GM's emphasis upon the poor condition of the SUB Fund and the poor prospects of finding work with GM, coupled with statements that VTEP would never be offered, created a sense of urgency to accept the SUB buyout and to do so quickly. GM's failure to accurately state the status of VTEP was, thus, materially misleading. GM, through its half truths and concealment of material facts, misled its employees.

Contrary to GM's assertions, the Court of Appeals did not impose a duty of disclosure. Indeed, the Court of Appeals' opinion emphasizes that GM was guilty of misrepresentations. The Sixth Circuit stated as follows:

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[1] GM's entire argument that the District Court imposed a duty to disclose is based on a portion of a sentence in the District Court's opinion. GM, however, conveniently omits the context in which that statement was made and the District Court's conclusion of that sentence. In full, that sentence states as follows: "Although GM did not make any truly false statements without the benefit of hindsight, GM did mislead its employees of the Norwood plant by not disclosing that a VTEP type plan would be offered or even that the local management was pursuing such a plan. In such a situation, where the livelihood of some twenty-nine hundred employees were at stake, GM should have at least mentioned the progress and the efforts of local management, instead of just presenting a grim outlook as to future benefits." (R.70: Findings of Fact, Opinion and Conclusions of Law, p. 16).

> GM's consideration of the class' participation in VTEP was initiated during November, 1986, when the plant closing was announced. Thereafter, during the ensuing months to April 12, 1988, when GM made a VTEP program available to GM employees with more than ten years of seniority upon application, GM management had, in fact, been seriously considering this ultimate action without disclosing the internal progress of those considerations to the class. To the contrary, throughout this entire period GM was instructing its management personnel to convey negative impressions to the class indicating that VTEP would not be available for their participation and that the program was "dead in the water" as far as Norwood laid off employees were concerned.
>
> As a result of GM's misrepresentations during the period between September, 1987 and February, 1988, the class elected to accept the SUB buyout. . . . 977 F.2d at 249 (Emphasis Added).[2]

Thus, GM's entire basis for seeking certiorari is based upon a misstatement of the case. GM claims that this Court must review the decision of the Court of Appeals because the Sixth Circuit, unlike any other appellate court, has imposed a duty of disclosure upon an ERISA

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[2] GM's misrepresentations were emphasized by the Court of Appeals throughout its opinion. For example, the Court of Appeals stated that "[a]lthough the Norwood plant management consistently denied that VTEP would become available to them, GM management was, in fact, privately considering the option of their participation in VTEP. Relying upon management's statements, the class accepted the SUB buyout." 977 F.2d at 248.

fiduciary. Having begun from the erroneous premise that the Sixth Circuit imposed a duty of disclosure, it is not surprising to find GM arrive at the equally erroneous conclusion that certiorari must be granted. Nonetheless, despite GM's protestations to the contrary, the Sixth Circuit, as set forth previously, did not impose a duty of disclosure. Contrary to GM's statements, neither the District Court nor the Court of Appeals ruled that GM violated ERISA because it failed to advise Plaintiffs that a VTEP might some day be negotiated at Norwood. Plaintiffs have never asked any court for the imposition of any such duty. Had GM said nothing about VTEP, no liability could be imposed for ERISA imposes no obligation to disclose that a particular benefit might be offered. Had GM accurately stated the status of VTEP, GM could incur no liability because ERISA surely does not penalize an employer for being truthful.[3] Nonetheless, GM chose to discuss repeatedly VTEP. GM chose to state that VTEP would never be made available. By so choosing, GM misled Plaintiffs, inducing them to accept a less lucrative severance package. The District Court and the unanimous Court of Appeals rightly held that GM's conduct violated ERISA and GM must now bear the consequences of that conduct.

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[3] In this regard, GM also argues that if it had represented that VTEP was under consideration and then chosen not to offer VTEP, it would incur liability to those who delayed acceptance of the SUB buyout and thereby suffered a diminution of benefits. A fiduciary, however, does not breach its duties of loyalty, prudence, and acting for the employees' benefit by being honest. Indeed, ERISA is designed to protect employees from misleading conduct. It is doubtful that employees need such protection from the truth.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

All of GM's arguments as to the calamitous consequences that will ensue if the Court of Appeals' decision is upheld are based upon the assumption that the District Court and the Court of Appeals have imposed a duty of disclosure. As set forth previously, neither the District Court nor the Court of Appeals imposed a duty of disclosure. Consequently, GM has set forth no basis for review by this Court. In fact, the Court of Appeals specifically disclaimed any intention of creating a duty of disclosure, stating in its opinion that if a fiduciary chooses to respond to questions about an ERISA plan, it must provide complete and accurate responses and that such a duty "does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process." 977 F.2d at 251. As GM's entire basis for seeking review by this Court is erroneous, this Court should deny the Petition for Certiorari.

Nor will the decision of the Court of Appeals adversely effect the collective bargaining process. GM claims that the Court of Appeals upset the delicate balance of power in collective bargaining by requiring disclosure of GM's internal deliberations. However, mandating that an employer be accurate and truthful if it chooses to disclose information will not plunge the collective bargaining system into chaos. GM's argument stems from its erroneous assumption that the Court of Appeals has required GM to disclose its internal deliberations as to bargaining strategy. Neither the District Court nor the Court of Appeals

imposed any such duty. The Court of Appeals noted that GM's misleading communications violated ERISA. 977 F.2d at 251. Both the District Court and the Court of Appeals merely held that because GM chose to discuss the availability of VTEP, it was not free to mislead its employees as to the status of VTEP. Both the District Court and the Court of Appeals recognized that GM was not required to disclose anything. Nonetheless, having chosen to disclose, GM was not free to mislead.

GM has, therefore, plainly overstated the importance of the Court of Appeals' decision. This decision will not have the broad consequences that GM claims. Rather, this decision is limited by the unique factual setting presented to the Court. This precise factual scenario is unlikely to be often repeated. Nonetheless, if this factual scenario is again presented, the Courts should follow this decision.[4] To rule otherwise would be to grant to an ERISA fiduciary, such as GM, a license to lie. GM's assertions as to the dire consequences that will ensue if the Court's decision is upheld have far more basis in rhetoric than in reality. GM has been required only to accurately convey the status of VTEP or to say nothing about VTEP. The Court of Appeals require no predictions; it merely required candor since GM had chosen to speak. The Court of Appeals' decision does not require an employer to disclose strategies as to employee benefit negotiations. GM's

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[4] GM also complains because, since the decision in this case, it has twice been sued for ERISA violations. Nonetheless, the solution to GM's predicament is quite simple: refuse to discuss ERISA benefit plans in the event of a plant closing or, in the alternative, tell the truth if it chooses to discuss ERISA benefit plans.

entire approach to this case stems from its premise that it did not mislead or misrepresent, a premise rejected by both the District Court and the Court of Appeals. The Court of Appeals simply held that because GM chose to communicate with Plaintiffs about VTEP, it had to honor, fully and completely, its fiduciary obligations and could not mislead Plaintiffs.[5]

II. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS IMPOSED A DUTY OF DISCLOSURE

The very issue upon which GM seeks review is a complete mischaracterization of the decisions of the District Court and the Court of Appeals. The District Court closely examined the duties imposed on an ERISA fiduciary when dealing with plan participants. These duties are the duty of loyalty, the duty of acting as a prudent man, and the duty of acting for the exclusive benefit of plan participants. In that context, the District Court found that

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[5] GM's misleading conduct would clearly have been actionable at common law, either through a cause of action for fraud or promissory estoppel. These common law claims, however, are pre-empted by ERISA. 29 U.S.C. §1144. Thus, as this Court noted in a different context, adopting GM's reading of ERISA "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 956 (1989). Clearly, this would be a curious result to reach from a statute enacted "to promote the interest of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896 (1983).

GM represented that VTEP would never be made available. (R. 71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 10, stating: "[i]n the context of information from both GM and UAW that VTEP was not available, and that the SUB fund might be depleted, or that SUB certificates might be further devalued, members of the Plaintiffs' class elected a SUB buyout . . . "). The District Court also found that GM repeatedly stressed the deteriorating condition of the SUB fund. (*Id.*, Finding of Fact Nos. 6, 9 and 10). GM's failure to mention the efforts to obtain VTEP, coupled with the statements that VTEP would never be offered and the grim outlook provided as to the SUB fund, misled Plaintiffs into believing that VTEP would never be offered. Also, the District Court recognized that GM had a "duty not to make misrepresentations" (*Id.*, p. 15) and held that GM had breached that duty. (*Id.*).

Similarly, the Court of Appeals also recognized that GM misled the plaintiff class. The Court of Appeals stated in its opinion that throughout the period from November, 1986 through April, 1988, "GM was instructing its management personnel to convey negative impressions to the class indicating that VTEP would not be available for their participation and that the program was 'dead in the water' as far as laid-off Norwood employees were concerned." 977 F.2d at 249. The Court of Appeals further stated that "[a]s a result of GM's misrepresentations during the period between September, 1987 and February, 1988, the class elected to accept the SUB buyout. . . . " *Id.* (Emphasis Added). GM's misrepresentations were also emphasized by the Court of Appeals in its

statement that "[a]lthough the Norwood plant management consistently denied that VTEP would become available to them, GM management was, in fact, privately considering the option of their participation in VTEP." *Id.* The Court of Appeals further stated that "relying upon management's statements, the class accepted the SUB buyout." *Id.* (Emphasis Added). Clearly, therefore, neither the District Court nor the Court of Appeals imposed the unprecedented duty of disclosure that GM claims.

GM further argues that it was not acting as a fiduciary when it represented to Plaintiffs that VTEP would never be made available. 29 U.S.C. §1104 imposes fiduciary duties upon an employer which administers an ERISA plan. GM has admitted that it is the plan administrator/fiduciary for VTEP. The question is then whether GM acted in a fiduciary capacity when it communicated with its employees about the availability of VTEP. The Sixth Circuit, relying upon its prior opinion in *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), held that GM was acting as a fiduciary when it represented to Plaintiffs that VTEP would never be offered to Norwood employees. (R.113: Clarke at TR Day 1, pp. 167-168; R.114: Price TR Day 2, pp. 170-172; R.114: Allen TR Day 2, pp. 64, 70, 77; Partin at TR Day 2, pp. 88-89; Drennan at TR Day 2, pp. 99-102).[6] In *Berlin*,

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[6] GM attempted to distinguish *Berlin* in the Court of Appeals and to thereby argue at that level that, although GM may have misled its employees, as found by the District Court (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 16), that GM made no affirmative misrepresentations. Similarly, GM argues in its Petition that it made no affirmative misrepresentations. Thus, GM argues that ERISA allows it to mislead through

the Sixth Circuit noted that the decision to offer an ERISA plan was a non-fiduciary business decision. However, the Court in *Berlin*, and also in the case at bar, recognized that a distinction must be drawn between the actual corporate decision to offer benefits and the communications made by fiduciaries about the likelihood of the offering of the plan. The Court in *Berlin* held that "when serious consideration was given by MBT to implementing MIPP by making a second offering . . . then MBT as the plan administrator and/or plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally to potential plan participants concerning the second offering." 858 F.2d at 1163-64.

Under *Berlin*, an employer acts as a fiduciary when it makes representations about the future offering of an ERISA plan and must, therefore, comply with the fiduciary duties imposed by 29 U.S.C. §1104. As in *Berlin*, GM sponsored a severance package, VTEP. As in *Berlin*, GM's

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half truths and concealment of material facts, so long as no affirmative misrepresentations are made. Although the evidence in this case demonstrated that GM did, in fact, make affirmative misrepresentations, the Sixth Circuit in *Berlin* ruled that misleading statements may be made either intentionally or negligently, and that either could operate to create in the mind of the listener an inaccurate understanding of the facts. The law has long recognized that one can mislead another through partial revelations of fact. *See, e.g., Walter v. Marion Production Credit Association*, 42 Ohio App.3d 215, 537 N.E.2d 676 (1987). Neither the District Court nor the Court of Appeals, however, imposed a duty of disclosure. The District Court and the Court of Appeals merely held that because GM chose to discuss VTEP, it was prohibited from doing so in a misleading manner.

decision to offer VTEP was a non-fiduciary business decision. As in *Berlin*, the argument that the decision to offer the plan was a non-fiduciary business decision misses the point. Plaintiffs do not challenge GM's right to offer VTEP. Like the plaintiffs in *Berlin*, Plaintiffs in the case at bar were not contractually entitled to VTEP. GM remained free to offer or not offer VTEP. (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 12). However, having chosen to offer VTEP and having chosen to communicate with Plaintiffs as to the availability of VTEP, GM assumed the role of an ERISA fiduciary and was required to comply with the duties imposed by 29 U.S.C. §1104.

The evidence at trial established that GM repeatedly communicated to Plaintiffs that the Norwood plant did not qualify for VTEP, and that VTEP would never be made available to the Norwood employees. At the meetings held during the week of September 21 through 25, 1987, GM told employees that the condition of the SUB fund would worsen, causing a reduction of weekly SUB payments. (R.113: Clarke at TR Day 1, p. 163). Kenneth Gallinger instructed Norwood management that they would be out of line if they even suggested that VTEP was a possibility. (R.113: Maisch at TR Day 1, p. 118). Norwood management followed this instruction, representing that VTEP was "dead in the water," and that the SUB buyout was the only buyout that would ever be offered. (R.113: Clarke at TR Day 1, pp. 167-168). When asked, GM representatives specifically stated that VTEP would never be made available. (R.114: Drennan at TR Day 2, pp. 99-102; R.114; Allen at TR Day 2, pp. 64, 70, 77; R.114: Partin at TR Day 2, pp. 88-89; R.113: Clarke at TR

Day 2, pp. 88-89; R.114: Price at TR Day 2, pp. 170-172). GM, thus, encouraged the employees to take the SUB buyout. (R.114: Allen at TR Day 2, pp. 63-64; R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 6, pp. 5-6).

III. THE SIXTH CIRCUIT HAS NOT REQUIRED GM TO DISCLOSE ITS INTERNAL DELIBERATIONS AS TO COLLECTIVE BARGAINING NEGOTIATIONS

GM next claims that ERISA's fiduciary standards do not apply because it was undertaking "internal deliberations" about whether to offer VTEP. Plaintiffs, however, do not challenge GM's internal deliberations. Plaintiffs could not have been misled by what GM did internally. GM misled Plaintiffs by making public representations that VTEP would never be made available. (R.114: Drennan at TR Day 2, pp. 99-102; R.114: Clarke at TR Day 2, pp. 88-89). Because VTEP was under serious consideration, GM was governed by ERISA's fiduciary standards when making its representations about a future offering of VTEP.[7] Because GM chose to mislead Plaintiffs through

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[7] To support its argument that ERISA's fiduciary duties are inconsistent with the role of an employer in a collective bargaining situation, GM blatantly misrepresents the holding of *United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985). In that case, the Court merely held that an employer did not act as a fiduciary while negotiating an agreement, because of the obviously conflicting roles of fiduciary and negotiator. Where, as here, however, representations are made about the potential offering of an ERISA plan, ERISA's fiduciary duties do apply. *See, Berlin v. Michigan Bell Telephone Company*, Supra.

its statements and conduct, GM breached it fiduciary duties under *Berlin*.[8]

In short, GM acted as a fiduciary when it made representations concerning the availability of VTEP. The District Court and the Court of Appeals simply held that since GM chose to disclose information about VTEP, it could not, through half truths, partial disclosure, and concealment of facts, mislead its employees. As recognized by the Sixth Circuit in *Berlin*, and in the case at bar, such conduct violates 29 U.S.C. §1104.

IV. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Court of Appeals' decision herein is not inconsistent with the decision of other Courts of Appeals. The decisions cited by GM are simply inapplicable, given the unique facts of this case. Due to GM's misrepresentations, its reliance on *Payonk v. HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989), is misplaced. In *Payonk*, the Plaintiffs never alleged that their employer misled them in any way. Rather, the employer said nothing. Absent any misrepresentations, liability under 29 U.S.C. §1104 could not attach for there is no duty to disclose. 883 F.2d at 226. In

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[8] GM also argues that it can not be deemed a fiduciary because it could have utilized a third party administrator, and, had it done so, it would have not known the status of VTEP. This is patent nonsense. GM did not use an outside administrator. It did know the status of VTEP. GM chose to make misrepresentations about VTEP. Thus, what GM could have done can not allow it to escape responsibility for what it actually did.

Berlin, and in the case at bar, the employer chose to communicate about the potential offering of the plan and, in so communicating, misled its employees. Thus, cases such as *Payonk*, which recite the general rule there is no duty to disclose potential changes in a plan, are of no consequence. Nor is the decision in *Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991) inconsistent with the Sixth Circuit's holding in *Drennan*. In *Barnes*, unlike *Drennan*, the District Court found, as a fact, that the employer had no plans to offer the more lucrative benefit plan at the time of the plant closing. 927 F.2d at 541. In fact, the plan was not under consideration at the time of the plant closing, as it was a onetime offer. *Id.* The Court in *Barnes* emphasized that "[i]n its findings of fact, the trial court determined that plaintiffs had failed to show that Alagasco either contemplated or intended to offer a voluntary retirement plan subsequent to VERO." *Id.* The Court of Appeals held that this factual finding was not clearly erroneous (927 F.2d at 542-543) and, as a result, held that the employer had not breached its fiduciary duties under ERISA. 927 F.2d at 544. The *Barnes* Court noted that its decision was consistent with *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), because under *Berlin*, liability could only be imposed for material misrepresentations. 927 F.2d at 544. Because there were no misrepresentations, there could be no liability. *Id.* In *Berlin* and *Drennan*, the Plaintiffs produced evidence of mispresentations and, therefore, the Sixth Circuit, consistent

with *Barnes*, held that liability could be imposed for breach of fiduciary duties.[9]

Plaintiffs did not request, nor did the District Court or the Court of Appeals impose, a duty of disclosure. Numerous courts, like the Court herein, have held that misleading communications to a plan's participants constitute a breach of fiduciary duties. *See, e.g., Local Union 2134, United Mine Workers of America v. Powhatten Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987); *Meunchow v. Parker Pen Co.*, 615 F.Supp. 1405, 1417 (W.D. Wis. 1985). As stated in *Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 326 (7th Cir. 1983), "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [29 U.S.C. §1104]." *See also, Eddy v. Colonial Life Insurance Co. of North America*, 919 F.2d 747, 750 (D.C. Cir. 1990).

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[9] GM also cites *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). In *Stanton*, the Court held that there was no duty to disclose information on potential plan amendments. The *Stanton* Court, however, recognized the claims of misrepresentation were not supported by the evidence, implying that such misrepresentations, if proven, would violate ERISA. *Id.*, at 435. The other cases relied upon by GM also deal only with a failure to disclose information. *See, Young v. Standard Oil (Indiana)*, 848 F.2d 1039, 1045 (7th Cir. 1988), *cert. denied*, 488 U.S. 481, 109 S.Ct. 529 (1988); *Porto v. Armco, Inc.*, 825 F.2d 1274 (8th Cir. 1987), *cert. denied*, 485 U.S. 937, 108 S.Ct. 1114 (1988); *Trexel v. E.I. du Pont de Nemours & Company*, 845 F.2d 1016 (3d Cir. 1988); and *Sleichter v. Monsanto Company*, 612 F.Supp. 856 (E.D. Mo. 1985). (The Court specifically noted there was no evidence of misrepresentations. 612 F.Supp. at 859). Thus, these cases, like *Payonk*, do not justify GM's conduct in the case at bar.

CONCLUSION

Based upon the foregoing legal authority and arguments, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENERAL MOTORS CORPORATION, PETITIONER

v.

JOANN DRENNAN, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our petition, we explained that the Sixth Circuit has imposed a duty on employers to disclose to employees that they are considering possible changes to an ERISA welfare benefit plan. This duty is unsupported by Congress' statutory scheme, is at odds with the common law principles ERISA incorporates, and is misguided as a matter of policy. The Sixth Circuit's aberrant rule will have grave practical consequences for both employers and employees, as well as for the collective bargaining process. It is thus not surprising that every other court of appeals to consider the issue has rejected the duty of disclosure imposed by the Sixth Circuit here.

Respondents do not even attempt to refute our argument that the Sixth Circuit's disclosure rule is inconsistent with ERISA and unsound as a matter of policy. Moreover, respondents concede that no other court of appeals has imposed such a duty of disclosure. Instead, respondents argue that review is not warranted here because the Sixth Circuit did *not* impose any duty of disclosure; this case, respondents claim, really involves "misrepresentations."

There are several problems with respondents' attempt to avoid the clear holding of the court of appeals. First, respondents simply ignore the Sixth Circuit's unequivocal statement that GM had "a fiduciary duty to keep [employees] abreast of [management's] consideration" of possible benefit plan changes (Pet. App. 14a) -- *i.e.*, *a duty of disclosure*. Second, characterizing GM's conduct as "misrepresentations" does not change the essence of the court of appeals' ruling that GM breached its fiduciary duty simply by not informing employees that local plant managers were still considering the VTEP issue. The district court expressly rejected the notion that GM made any affirmative misstatements of fact to its employees, and the court of appeals' opinion does not identify any misstatement that would provide a basis to question the district court's conclusion, much less to reject it as clear error.

1. The plain language of the court of appeals' opinion refutes respondents' contention that the Sixth Circuit did not impose a duty of disclosure on employers under ERISA. The court of appeals (correctly) characterized the district court's "conclusion" as placing "GM * * * under an ERISA fiduciary *duty to disclose* its considerations" about whether to offer VTEP. Pet. App. 11a (emphasis added). The court of appeals went on to state that an employer has a duty under ERISA to "*disclose[] the progress* of its serious considerations to make a plan available to affected employees." Pet. App. 13a (emphasis added), citing *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988). The

court concluded that "GM was impressed with a fiduciary *duty to keep [employees] abreast* of its consideration" of VTEP. Pet. App. 14a (emphasis added). Although respondents devote 12 pages of their brief to an attempt to convince this Court that the Sixth Circuit has not created a duty of disclosure, Br. in Opp. 11-16, 19-24, not once in those pages do respondents even mention, much less try to explain, the three critical statements from the court of appeals' opinion quoted above.

The district court's opinion provides respondents no more support. After confirming that "GM did not make any truly false statements without the benefit of hindsight," the district court went on to give the basis for its conclusion that GM nevertheless "misled" respondents: GM dealt with the plaintiff class unfairly "*by not disclosing* that a VTEP-type plan would be offered or even that the local management was pursuing such a plan." Pet. App. 33a. The district court held that "GM should have * * * mentioned the progress and efforts of the local management * * *." *Ibid.* Thus, the district court's sole basis for concluding that anyone was misled by GM's comments was that GM did not disclose fully the efforts of its local management to bring VTEP to Norwood.[1] The court of appeals not only affirmed the district court's result, but explicitly endorsed its "conclusion" that "GM was under an ERISA fiduciary duty to disclose" the efforts of local Norwood officials to extend VTEP to Norwood employees. Pet. App. 11a.[2]

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[1] Respondents state (Br. in Opp. 14 n.1) that GM's description of the key passage of the district court's opinion "conveniently omits" what respondents refer to as the "context" of the statement. But the petition quoted the relevant sentence of the district court's opinion virtually in full, omitting only the words "of the Norwood plant." See Pet. 6, Pet. App. 33a.

[2] Contrary to respondents' repeated assertions (Br. in Opp. 16, 18 (continued...)

2. In an effort to make the case seem fact-bound, respondents devote 11 pages of their brief to an elaborate recitation of the history of the case. Br. in Opp. 1-11. The lengthy statement, however, does not contradict the facts as presented in our petition. On the contrary, it confirms the repeated efforts of local GM officials to obtain VTEP for Norwood, and it equally confirms senior GM officials' repeated rejection of those requests. Br. in Opp. 5-11. Respondents even acknowledge that during the time period in question, VTEP would indeed "have seemed dead in the water." Br. in Opp. 8.

Respondents nevertheless persist in asserting that GM made "misrepresentations" to its employees. They base this claim on an allegation that "GM representatives specifically stated that VTEP would never be made available to Norwood employees." Br. in Opp. 12. Respondents' assertion, however, is both factually false and legally untenable.

First, although respondents assert 13 times in a 28 page brief that GM told employees that VTEP would "never" be offered,[3] their citations to the record do not support the assertion. As the district court held, GM simply told

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[2] (...continued)
& n.4, 22 n.6), GM did not "choose" to discuss VTEP. As the testimony quoted in respondents' brief shows, GM representatives only unwillingly discussed VTEP, and "[o]nly when asked questions about it." Testimony of Joann Drennan, TR Day 2 at 100, quoted in Br. in Opp. at 13. Nor could GM have escaped liability under the rule created by the court of appeals by simply refusing to answer. See Br. in Opp. 18 n.4. "A fiduciary must give *complete and accurate* information in response to participants' questions" (Pet. App. 13a (emphasis added)). Respondents' insinuations that GM's troubles were somehow the product of garrulous representatives are therefore unwarranted.

[3] Br. in Opp. 2, 4, 12 (twice), 13, 14, 16, 20 (three times), 23 (twice), 24.

employees that VTEP "was not available" and was not an option at Norwood. Pet. App. 27a. Those statements were unquestionably correct at the time they were made. At none of the transcript pages cited by respondents did any witness use (or affirmatively respond to a question using) the word "never."[4] The only exchange involving the word "never" on any of the pages respondents cite, in fact, was between plaintiffs' and defendant's counsel, in which Mr. Kelly, counsel for plaintiffs, admitted that his witness had *not* used the word "never" in his testimony. TR Day 2 at 76.[5]

Second, even if GM had stated in September 1987 that VTEP would "never" be offered at Norwood, such a statement would not constitute a misrepresentation. "A misrepresentation is an assertion that is not in accord with the facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981). See also RESTATEMENT (SECOND) OF TORTS § 525 comment b (1977) ("[W]ords or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist."). GM made no assertions not in accord with

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[4] Respondents also seek to ascribe to the district court a finding that GM told its employees that VTEP would "never" be available. Br. in Opp. 4, 12, 19-20. The word "never" does not appear in the district court's opinion. The relevant finding of fact in the district court's opinion states that GM and the UAW provided employees with the information that VTEP "was not available." Pet. App. 27a.

[5] The witnesses on whose testimony respondents rely did testify that GM stated that VTEP was "absolutely not available for the Norwood plant" (Testimony of Jerry Allen, TR Day 2 at 63), that the SUB Buyout "was the best buy-out we were going to get. There was nothing else available to us" (*id.* at 64), and that "we did not qualify for * * * the VTEP buyout." *Id.* at 73. Again, each of these statements was concededly correct at the time it was made.

the facts: during the relevant time period, VTEP was *not* available to respondents.

Moreover, the statements attributed to GM would have been no more than a *prediction* about future events. Such a prediction does not rise to the level of a misrepresentation unless "the maker knows of [something] which will make the fulfillment of his prediction * * * impossible or improbable." *Id.* comment f. In light of senior GM officials' strong opposition to and repeated rejection of VTEP (see Br. in Opp. 6-8), as well as the need for union approval (which ultimately proved to be another major sticking point, see Pet. 5, Pet. App. 28a), at the time local officials stated that VTEP would not be available at Norwood such a prediction was anything but "impossible or improbable." Cf. Br. in Opp. 8 ("[T]he issue * * * whether VTEP would be made available may have seemed dead in the water * * *.").

Plainly, GM's *failure to disclose* the persistent but at the time seemingly fruitless efforts of local management to obtain VTEP for the Norwood workers is the sole basis for the court of appeals' unsupported statement (Pet. App. 9a) that GM made "misrepresentations." Non-disclosure, however, does not amount to a misrepresentation unless the non-disclosing party is under some independent *duty to disclose*. See generally RESTATEMENT (SECOND) OF CONTRACTS § 161. And although respondents devote much of their brief to arguing that GM's "consideration" of VTEP gave rise to such a fiduciary duty under ERISA (see Br. in Opp. 12, 21-24 & n.6), that question goes to the merits, and is in fact the precise question that we have asked this Court to review. See Pet. i.

3. The only support offered for respondents' statement that the opinion below does not conflict with the opinions of other courts of appeals is that those cases did not involve "misrepresentations." Br. in Opp. 25-27 & n.9. We have explained above that this case also does not involve any

misrepresentations; thus, our showing of a conflict among the circuits stands unrebutted. Moreover, a review of the facts of the cases in question establishes that what respondents and the Sixth Circuit have labelled a "misrepresentation" is no different from what other circuits have viewed as refusals to disclose that are perfectly permissible because the employers were under no ERISA duty of disclosure.

In *Payonk* v. *HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989), for example, employees "rolled over" their assets from the HMW pension plan to a new plan at the urging of their employers. *Id.* at 222-224. At the same time, HMW was considering whether to terminate the HMW plan. When the plan was terminated shortly thereafter, its surplus assets were distributed to the remaining participants. Because they had "rolled over" their HMW plan assets into new plans, the plaintiffs did not share in the distribution. *Ibid.*

The *Payonk* plaintiffs claimed that, had they known that HMW was seriously considering terminating the plan, they would have postponed their departure until after they had shared in the surplus. 883 F.2d at 226. That claim is indistinguishable from respondents' assertions that, had they known that local GM officials were still considering VTEP, they would not have elected the SUB Buyout. However, while the Third Circuit in *Payonk* recognized that "[u]ntil the termination decision became final * * * disclosure was not required," *id.* at 227, the Sixth Circuit in this case held that the same lack of disclosure amounted to a misrepresentation and a violation of fiduciary duty under ERISA. The cases are thus in irreconcilable conflict.[6]

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[6] Respondents' attempt to distinguish *Stanton* v. *Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), is similarly lacking in merit. Respondents rely on the fact that the Fourth Circuit found that Gulf's failure to disclose did not amount to a misrepresentation. Br. in Opp. 27 n.9. That is precisely the point: in this case the (continued...)

4. Respondents cannot dispel the clear fact that in light of the court of appeals' holding, employers in the Sixth Circuit have a duty to disclose to employees that they are seriously considering changes to an ERISA plan. That duty remains, whether we call it a duty of disclosure or a duty to avoid misrepresentations. As we demonstrate in the petition, the Sixth Circuit's disclosure rule is inconsistent with the provisions of ERISA, is misguided as a matter of federal benefits policy, and is contrary to the law in other circuits. Review by this Court is essential to restore uniformity and sensible benefits regulation.

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[6] (...continued)
Sixth Circuit held that virtually identical conduct *did* constitute a misrepresentation. The evidence in *Stanton* showed that the plaintiff asked Gulf whether there were plans to change the company's retirement policy during the following year. The representative to whom Stanton spoke stated that he was aware of no such changes. In fact, the Gulf Oil Board of Directors had already approved changes to the company's retirement benefits; the changes were not implemented until after Stanton had retired. *Id.* at 433. The fact that the Fourth Circuit found that the company's representative's assurances did not constitute misrepresentations highlights the conflict between *Stanton* and the rule of disclosure imposed by the Sixth Circuit here.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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